Supreme Court, U.S.
FILED

No. 02- 02 358 SEP - 3 2002

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IN THE

Supreme Court of the United States

GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

1. Whether corporations are entitled to invoke the protections of the Bill of Attainder Clause, U.S. Constitution, art. I, § 10, cl. 1.

2. Whether Chapter 190 of the New York Laws of 2000, a legitimate economic regulation that prohibited Con Edison from recovering from its ratepayers replacement power costs incurred as a result of a forced shut-down of its Indian Point 2 nuclear power plant, imposes punishment within the meaning of the Bill of Attainder Clause.

PARTIES TO THE PROCEEDING

Con Edison was the plaintiff in the courts below and is the respondent in this Court. Governor Pataki, and Maureen O. Helmer, Thomas J. Dunleavy, James D. Bennett, Leonard A. Weiss, and Neal N. Galvin, in their official capacities as Chair and Commissioners of the New York State Public Service Commission, were the defendants below and are petitioners in this Court. Sheldon Silver and Richard L. Brodsky, as Speaker and Member of the New York State Assembly, were intervenor-defendants below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 292 F.3d 338 (2d. Cir. 2002), is set forth in Appendix A. The Memorandum Decision and Order of the United States District Court for the Northern District of New York granting Con Edison's motion for a permanent injunction, reported at 117 F. Supp. 2d 257 (N.D.N.Y. 2000), is set forth in Appendix B. The amended judgment of the District Court, correcting a scrivener's error on remand from the Second Circuit, is set forth in Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered June 5, 2002. This petition is filed within ninety days of that date, as required by 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Bill of Attainder Clause, U.S. Constitution, Art. I, § 10, cl. 1 provides:

"No State shall . . . pass any Bill of Attainder."

Act of Aug. 8, 2000, Chapter 190 of 2000 New York Laws provides in full:

AN ACT prohibiting the recovery of costs in connection with a radiation leak at the Indian Point 2 Nuclear Facility on February 15, 2000

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Declaration of legislative findings. The operator of a nuclear generating facility has a high duty of care to protect the health, safety and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.

By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.

§ 2. With respect to the February 15, 2000 outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility. Such prohibition shall apply to any such costs incurred until the conclusion of such outage, or incurred at any time until all defective steam generation equipment at the facility has been replaced, whichever occurs later. Such prohibition shall apply to automatic adjustment mechanisms as well as base rates or any other rate recovery mechanism. The commission shall order the company to refund any such costs which have been recovered from ratepayers.

§ 3. This act shall take effect immediately.

STATEMENT OF THE CASE

Introduction

This case concerns the validity of a state law that was passed in response to a forced shutdown of the Indian Point 2 ("IP2") nuclear power plant, located in New York State. Chapter 190 of the New York Laws of 2000 prohibits Con Edison, a regulated electrical utility, from passing on to its ratepayers the cost of replacement energy it was required to purchase to serve its customers' energy needs during the year-long shutdown (estimated at $250 million or more). The Second Circuit struck down Chapter 190 as a violation of the Bill of Attainder Clause. This holding is unprecedented, for it is the first time a federal appeals court has invalidated a statute on the ground that it operates as a bill of attainder against a corporation. Additionally, in reaching that result, the court below required an exceedingly close fit between the statute's concededly nonpunitive goals and its reach. In doing so, it impermissibly expanded this Court's test for determining whether a statutory scheme imposes prohibited punishment within the meaning of the Bill of Attainder Clause.

A. Background

On February 15, 2000, a leak resulting from a tube rupture in one of the four steam generators at the Indian Point 2 nuclear power plant in Westchester County, New York, caused a radioactive release and the forced shutdown of the reactor. The "Model 44" steam generators used at the plant were known to have a history of tube degradation leading to excessive cracking and thus the potential for tube leaks. Con Edison, the operator of the IP2 plant at that time, was the only nuclear plant operator in the country still using the Model 44 steam generator. Notably, years earlier Con Edison (along with other plant operators using the Model 44)

had sued the manufacturer over this problem and received replacement generators, which Con Edison did not install.

The shutdown caused by the February 2000 leak continued for almost one year, by which time Con Edison had replaced the defective generators and restarted the plant. During the shutdown, in order to supply its electric customers with the power formerly generated at IP2, Con Edison purchased replacement electricity from other sources in the wholesale market at a daily cost of approximately $600,000. The increased power costs associated with the shutdown have been estimated at $250 million or more.

As a public utility, Con Edison's rates are set by the State. Originally, in New York as in most states, the State Legislature set the rates for public utilities by legislative enactment. *See, e.g.*, Act of April 9, 1874, 1874 N.Y. Laws, ch. 144 (setting rates that a Brooklyn utility may charge for illuminating gas); Act of June 3, 1905, 1905 N.Y. Laws, ch. 732 (setting maximum rate for electricity in New York City). In 1907, the Legislature created the Public Service Commission ("PSC") and delegated to that agency authority to set "just and reasonable" electricity rates and engage in general regulatory oversight of the State's public utilities.[1] *See* Act of June 6, 1907, 1907 N.Y. Laws, ch. 429; Act of June 14, 1910, 1910 N.Y. Laws, ch. 480; N.Y. Pub. Serv. Law §§ 64-77 (McKinney 2002).

At the time of the tube rupture, Con Edison's filed rates, approved by the PSC pursuant to its delegated authority, included a Fuel Adjustment Clause ("FAC"). This FAC

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1. Until 1921, the Legislature continued to determine the maximum rates that a utility could charge and delegated to the PSC only the authority to set rates within the legislatively-set maximum. *See* Act of March 30, 1921, 1921 N.Y. Laws, ch. 134, § 49 (authorizing PSC to set maximum rates).

allowed Con Edison to pass on to its customers a significant portion of any monthly fuel costs that exceeded set estimates, subject to retrospective review and adjustment if the PSC later determined that the fuel costs were caused by imprudence. *See Matter of Niagara Mohawk Power Corp. v. Public Serv. Comm'n*, 69 N.Y.2d 365, 507 N.E.2d 287 (1987).

Immediately following the leak and forced shutdown, the PSC began investigating the outage as part of a multi-agency task force authorized by the Governor. It did not initiate a formal proceeding to review whether the replacement energy costs were reasonably incurred until March 30, 2000, shortly after the statute at issue here was introduced in the Assembly.[2] The PSC rejected a request by a number of legislators to suspend operation of Con Edison's FAC, and thus prohibit further cost recovery from the ratepayers, during the pendency of the proceeding.

In response to the leak and forced shutdown and the fact that the increased power costs would otherwise be passed on to the ratepayers, the New York State Legislature enacted Chapter 190. The Legislature found that Con Edison had increased the risk of an expensive plant outage by continuing to operate known defective steam generators. It also found that Con Edison had failed to exercise reasonable care to protect the health, safety, and economic interests of its customers. The law accordingly directed the PSC to prohibit Con Edison from collecting replacement power costs associated with the February 15 outage and to order Con Edison to refund any such costs previously recovered from its ratepayers. *See* Act of Aug. 8, 2000, 2000 N.Y. Laws, ch. 190.

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2. The PSC's administrative proceeding has been informally stayed during the pendency of this litigation.

B. District Court Decision Granting Permanent Injunction

Immediately following the enactment of Chapter 190, Con Edison commenced this lawsuit in the United States District Court for the Northern District of New York. In its complaint, Con Edison claimed that the law violated the federal constitution in six respects: as a denial of equal protection, an impermissible bill of attainder, a confiscation of its property without just compensation, a denial of procedural due process and a violation of the Contracts and Supremacy Clauses. The complaint named the Governor of the State of New York and the chair and members of the Public Service Commission as defendants. Sheldon Silver and Richard L. Brodsky, respectively Speaker and Member of the New York State Assembly, sought to intervene as defendants, which the District Court permitted under Rule 24(b)(2) of the Federal Rules of Civil Procedure.

Con Edison moved by order to show cause for a preliminary and permanent injunction enjoining enforcement of Chapter 190. On the parties' written submissions (none of the parties requested an evidentiary trial) and following oral argument, the District Court held that the law violated Con Edison's right to equal protection and constituted an impermissible bill of attainder. The court granted a permanent injunction enjoining defendants from taking any action to enforce Chapter 190. *See Consolidated Edison v. Pataki*, 117 F. Supp. 2d 257 (N.D.N.Y. 2000).

C. Second Circuit Decision

While expressing skepticism about the District Court's conclusion that Chapter 190 violated principles of equal protection, the U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment on the ground that

Chapter 190 constitutes an unlawful bill of attainder. *See Consolidated Edison v. Pataki*, 292 F.3d 338, 345 & n.2 (2d Cir. 2002).

To do so, the Second Circuit had to determine squarely an important and unsettled issue in federal law — whether a corporation is entitled to the protections of the Bill of Attainder Clause. Although admitting that it was "unable to unearth any case in which a corporation has ultimately prevailed in challenging legislation as a bill of attainder," *id.* at 348, and that no other court of appeals had so held, the Second Circuit nonetheless concluded that corporations are "individuals" that enjoy the protections of the Bill of Attainder Clause. *See id.* at 348, 349. The court thus found that Chapter 190 satisfied the second element of the bill of attainder test (specificity) because it named " 'an identifiable individual.' " *See id.* at 346, 349 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)).

Because the court found it "incontrovertible" that Chapter 190 lacked the protections of a judicial trial (the third element of a bill of attainder), *see* 292 F.3d at 346, it focused its bill of attainder analysis on the first element — whether Chapter 190 determines guilt and imposes punishment. While largely ignoring the fact that the statute at issue involved an element of ratemaking, the Second Circuit first concluded that because Chapter 190 limited Con Edison's ability to recover these costs based upon a past event — the IP2 outage — it was pronouncing guilt on Con Edison. *See id.* at 349.

The court then analyzed whether Chapter 190 imposed punishment. Its analysis focused on the "functional" test for punishment, which looks to " 'whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.' " *Id.* at 351 (quoting *Nixon*, 433 U.S. at 475). Under this test, the absence of *any* legitimate

legislative purpose provides evidence that the law was intended as punishment of those affected by it. *See Nixon*, 433 U.S. at 475.

Although the Second Circuit recognized that Chapter 190 served a number of nonpunitive purposes, it found that there was an insufficiently close fit between these nonpunitive purposes and the burdens imposed by the statute. The court reasoned that some of the replacement power costs — those attributable to the time spent replacing the defective generators — would have been incurred even if Con Edison had not unreasonably delayed in replacing the generators. *See* 292 F.3d at 353-54. Because it found that the denial of replacement costs exceeded what was necessary to achieve the legislative purposes, and that the Legislature could have attempted to limit the disallowance more precisely, the court concluded that the statutory scheme demonstrated an intent to punish Con Edison and thus that Chapter 190 violated the Bill of Attainder Clause. Accordingly, the court affirmed the judgment of the District Court permanently enjoining enforcement of this state law.[3]

REASONS FOR GRANTING THE PETITION

I. The Court Below Decided the Important and Unsettled Question of Whether a Corporation is Entitled to the Protections of the Bill of Attainder Clause.[4]

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3. Although affirming the District Court judgment, the Second Circuit remanded the matter to the District Court to correct a scrivener's error in the original judgment, which stated that the case was "dismissed" in plaintiff's favor. *See* 292 F.3d at 355-56. The amended judgment was entered by the District Court on July 2, 2002 (Appendix C).

4. The issue of whether corporations are entitled to the protections of the Bill of Attainder Clause is properly presented for

(Cont'd)

The Court should grant certiorari in this case because the court below addressed the unsettled issue of whether a corporation is entitled to the protections of the Bill of Attainder Clause, an important question that this Court has never answered.

A. The question whether a corporation may avail itself of the protections of the Bill of Attainder Clause is unsettled and should be answered by this Court.

Neither the Supreme Court nor any circuit other than the court below has ever relied upon the Bill of Attainder Clause to invalidate a statute affecting a corporation. The court below relied upon dicta in two decisions of this Court, neither of which dealt with corporations and one of which did not even involve a bill of attainder claim. The unprecedented reach of its decision was apparent to the court below, which recognized that it was "unable to unearth *any* case in which a corporation has ultimately prevailed in challenging legislation as a bill of attainder." *Consolidated Edison*, 292 F.3d at 348 (emphasis added). An unsettled question of such constitutional magnitude should be resolved by this Court itself.

The Second Circuit relied upon a reference to the protections offered "private groups" by the Bill of Attainder Clause in *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). *See Consolidated Edison*, 292 F.3d at 347. There is no reason to think this reference encompasses corporations. *Katzenbach*

(Cont'd)

this Court's review notwithstanding that petitioners Pataki and the Public Service Commission members did not raise this issue in the courts below, inasmuch as it was raised by the other parties to the proceeding and decided by the Second Circuit. *See Williams v. United States*, 504 U.S. 36, 41-43 (1992) (recognizing that Court's jurisdiction extends to issues raised or passed upon by the court below).

involved a challenge to portions of the Voting Rights Act, primarily on the ground that the statute exceeded Congress's authority and encroached on an area reserved to the States. This Court accordingly noted that "[c]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *Katzenbach*, 383 U.S. at 324.

This statement was simply a succinct rejection of the State's bill of attainder and separation of powers claims on the ground that these constitutional provisions do not protect states. The specific reference to "private groups" had little if any bearing on the holding that states cannot assert these protections and therefore constitutes dictum. In any event, the Court appears to have been referring only to the fact that the Bill of Attainder Clause reaches legislation that targets "easily ascertainable members of a group," *United States v. Lovett*, 328 U.S. 303, 315 (1946), such as members of a political party, *see, e.g., United States v. Brown*, 381 U.S. 437 (1965) (members of Communist party), as well as legislation that applies to specific persons. *See Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (Bill of Attainder Clause prohibits legislative punishment of " 'specifically designated persons or *groups*' " (quoting *United States v. Brown*, 381 U.S. at 447 (emphasis added))).

The other Supreme Court decision relied upon by the Second Circuit, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), has an even more tenuous connection to the issue here, for it did not involve a bill of attainder claim. Rather, *Plaut* was a challenge to a provision of the Securities and Exchange Act of 1934 on the ground that it required federal courts to reopen final judgments in violation of principles of separation of powers and due process. The sentence relied

upon by the court below appears in the portion of the opinion rejecting the view, expressed in the concurrence, that the law at issue effectively singled out a class of lawsuits or group of defendants. *See id.* at 239 & n.9. The Court's glancing reference to a "firm" in this sentence is dictum, and cannot be taken as any resolution of this important question.

Nor has any circuit other than the court below struck down a statute on the ground that it operated as a bill of attainder against a corporation, or fully analyzed whether corporations are entitled to the protections of the Bill of Attainder Clause. When considering bill of attainder challenges brought by corporations, the federal courts of appeals have rejected these challenges on the merits, finding that the law did not impose punishment or was not sufficiently specific. In doing so, the circuit courts have either assumed that the Clause applies to corporations, with minimal analysis to support that assumption (and relying in part on the dictum of this Court in *Plaut*)[5] or simply rejected the bill of attainder claim without addressing the issue of the plaintiff's corporate

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5. **D.C. CIRCUIT:** *See BellSouth Corp. v. F.C.C. (BellSouth II)*, 162 F.3d 678, 684 (D.C. Cir. 1998) (parties and court assumed); *BellSouth Corp. v. F.C.C. (BellSouth I)*, 144 F.3d 58, 63 (D.C. Cir. 1998) (parties and court assumed; minimal analysis), *cert. denied*, 526 U.S. 1086 (1999); *see also Navegar, Inc. v. United States*, 192 F.3d 1050, 1065 (D.C. Cir. 1999) (citing *BellSouth II*, without discussion, for general proposition that bill of attainder is a law that "singles out individuals (or businesses) and imposes punishment"), *cert. denied*, 531 U.S. 816 (2000). **FIFTH CIRCUIT:** *See SBC Communications, Inc. v. F.C.C.*, 154 F.3d 226, 234 & n.11 (5th Cir. 1998) (assumption & minimal analysis), *cert. denied*, 525 U.S. 1113 (1999). **SEVENTH CIRCUIT:** *See Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir.) (in dictum, court "assumed without deciding" that Bill of Attainder Clause protects corporations, but struck down challenged measure on other grounds), *cert. denied*, 531 U.S. 1011 (2000).

status at all.[6] The Second Circuit therefore stands alone among the federal circuits.

B. This Court should grant certiorari because the unwarranted expansion of the Bill of Attainder Clause by the court below is of significant public importance.

The Court should grant certiorari because the decision of the court below to extend the Bill of Attainder Clause to corporations is of tremendous public importance and represents an unwarranted expansion of the Clause.

First, the question of the applicability of the Bill of Attainder Clause to corporations is of substantial public importance because it will expose numerous laws regulating businesses to constitutional challenge — even in highly-regulated industries such as utilities, where legislatures have traditionally exercised broad powers. Corporations will rely on the decision of the court below — the first in which a corporation has successfully challenged a statute under the Bill of Attainder Clause — to attempt to block legitimate corporate regulation aimed at identifiable groups of corporations. It is not uncommon for Congress and the state legislatures to target particular groups of corporations through economic regulation. *See, e.g.*, Public Utility Holding Company Act of 1935, ch. 687, 15 U.S.C. §§ 79-79z-6 (1997). And, because the specificity requirement of the Bill of Attainder Clause is met where the legislation singles out "an identifiable group," *Selective Service*, 468 U.S. at 847 n.3, corporations may well bring bill of attainder challenges to many commonplace economic measures that

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6. *See, e.g., WMX Techs., Inc. v. Gasconade County*, 105 F.3d 1195 (8th Cir. 1997); *Fresno Rifle & Pistol Club, Inc. v. John K. Van de Kamp*, 965 F.2d 723, 727-29 (9th Cir. 1992); *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991), *cert. denied*, 506 U.S. 820 (1992).

limit the conduct of or place regulatory burdens upon particular industries. The Bill of Attainder Clause was never intended to reach this type of corporate regulation, and only a decision from this Court will settle the matter.

Second, the decision of the court below misapprehends the purpose of the Clause and neglects the context in which it has heretofore been applied. Although the Supreme Court has not applied a consistent test to determine whether a specific constitutional guarantee will be extended to corporations, it has described the relevant considerations as involving the "nature, history, and purpose of the particular constitutional provision." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). Additionally, the nature of corporations as artificial persons, created by and subject to regulation by the government, has also been important to the Court's analysis. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (relying on the public nature of corporations and their "collective impact upon society, from which they derive the privilege of acting as artificial entities," to conclude that corporations do not enjoy same Fourth Amendment right to privacy as individuals); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (holding that corporations cannot invoke Fifth Amendment privilege against self-incrimination); *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (corporation is not "citizen" within meaning of the Privileges and Immunities Clause).

The nature, history and purpose of the Bill of Attainder Clause all weigh strongly against extending it to corporations. The Bill of Attainder Clause has not historically been applied to statutes aimed at corporations, and the Second Circuit erred in concluding otherwise. Corporations have begun to seek protection under the Bill of Attainder Clause only very recently and, as noted, the Clause has never been successfully asserted by a corporation until now. The Clause has instead been used exclusively to strike down statutes directed at

natural persons, either as specified individuals or as classes of persons with a particular attribute, such as membership in a political party, in common. This is highly significant, for as this Court has noted, "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantees has been limited to the protection of individuals." *Bellotti*, 435 U.S. at 778 n.14 (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)).

Thus, for example, in *United States v. Brown*, 381 U.S. 437 (1965), the statute invalidated by the Court made it a crime for members of the Communist Party to serve as officers of a labor union. Similarly, in *United States v. Lovett*, 328 U.S. 303 (1946), the act struck down by this Court restricted federal budget appropriations for the salaries of specifically-named government employees who were named as subversives in a House Report. And the only other cases in which this Court has found bill of attainder protections appropriate involved legislation punishing individuals who had sided with the Confederacy in the Civil War. *See Pierce v. Carskadon*, 83 U.S. 234 (1873) (loyalty oath denying ex-Confederates right to seek judicial redress); *Ex parte Garland*, 71 U.S. 333 (1867) (admission to practice of law conditioned upon oath that individual had never borne arms against or supported enemies of United States); *Cummings v. Missouri*, 71 U.S. 277 (1867) (act making it a crime to practice law or be a clergyman without taking an oath that individual had not been disloyal to United States).

Given this historical context, the Second Circuit's conclusion that bills of attainder have been directed at both corporations and individuals is without merit. Notably, the court below supported this conclusion only with a citation to a nineteenth-century English statute that stripped a borough of its seats in Parliament based upon findings of bribery and corruption. *See Consolidated Edison*, 292 F.3d at 348

(citing 1 & 2 Geo. IV, c.47 (1821)). But a borough is a governmental entity; it is not a private corporation. And nothing in American jurisprudence suggests that even governmental entities are protected by the Bill of Attainder Clause. *See Katzenbach*, 383 U.S. at 324 (states are not protected by the Clause from acts of Congress).

Indeed, the complete absence of bill of attainder challenges to the context in which this case arises — legislation involving an element of ratemaking — underscores the dramatic departure from historical practice by the court below. Nor can this absence be explained on the ground that it was rare for the legislatures to enact specific ratemaking measures. To the contrary, before the creation of utility commissions and the delegation of rate setting and utility oversight to those bodies, legislatures commonly engaged in rate setting through the enactment of legislation directed at specific companies. *See Verizon Communs., Inc. v. F.C.C.*, __ U.S. __, 122 S. Ct. 1646, 1655 (2002) (discussing history of utility regulation). As this practice evolved, constitutional constraints on the practice evolved with it. Yet the development of constitutional limitations in this area did not include those of the Bill of Attainder Clause. Rather, the only constitutional principle limiting such legislation was that of the Takings Clause: a rate could not be so low as to amount to a confiscation of property without just compensation. *See generally* Cassius M. Clay, *Regulation of Public Utilities: A Crucial Problem in Constitutional Government* 29-40 (1932).

Additionally, the purpose of the Bill of Attainder Clause weighs against including corporations within its scope. Historically, bills of pains and penalties (*i.e.*, those imposing a punishment less than death) were directed at politically disfavored and vulnerable minorities. *See Nixon*, 433 U.S. at 474; *Cummings*, 71 U.S. at 323. Accordingly, the types of punishments historically associated with bills of pains and

penalties were the traditional punishments imposed upon persons for disloyal activities and beliefs, *i.e.*, imprisonment, banishment, "punitive confiscation of property" by the sovereign and the loss of civil and political liberties, including the rights to vote, hold public office and participate in specified employment or professions. *See Selective Service*, 468 U.S. at 852; *Nixon*, 433 U.S. at 475; *Brown*, 381 U.S. at 441; *Cummings*, 71 U.S. at 323. And, as noted above, the individuals punished by bills of attainder were typically Communists or Confederates — persons perceived as subversives or traitors and thus punishable without public censure. A multi-billion-dollar monopoly is not such a "disfavored" person.

Moreover, the fact that "punitive confiscation of property" is one type of punishment historically imposed by bills of attainder does not, contrary to the conclusion of the court below, indicate that the Clause encompasses the types of injury that a corporation could suffer. *See Consolidated Edison*, 292 F.3d at 348-49. Rather, "punitive confiscation of property" has a narrow historical meaning: as a result of being branded as disloyal or accused of treason, an individual forfeited his or her property to the government. See *Nixon*, 433 U.S. at 474 n.38 (citing state laws enacted following the Revolutionary War, pursuant to which Tory sympathizers were found guilty of treason and their property seized by the state, as examples of bills of pains and penalties involving the punitive confiscation of property); Michael L. Landsman, *From Enemies of the Crown to Regional Telephone Companies: Bills of Attainder Reappraised*, 15 Touro L. Rev. 761, 763 (1999). The statute at issue here falls far outside this category of traditional punishment. The Second Circuit thus erred in relying upon the reference in this Court's decisions to the historical punishment of "punitive confiscation of property" to conclude that corporations are

within the intended scope of the Bill of Attainder Clause.[7] *See BellSouth Corp. v. F.C.C. (BellSouth II)*, 162 F.3d 678, 686 (D.C. Cir. 1998) ("run-of-the-mill business regulations" do not implicate concerns underlying historical punishments).

II. The Second Circuit's Determination that Chapter 190 Constitutes "Punishment" Conflicts with this Court's Precedents and with the Decisions of Other Circuits According Substantial Deference to the Legislature in Balancing Statutory Goals and Burdens.

This Court should grant certiorari because the Second Circuit's determination that Chapter 190 constitutes "punishment" conflicts with this Court's precedents in several important ways and cannot be squared with the decisions of other circuits according a legislative body wide leeway to enact laws with a reasonably nonpunitive purpose. First, the decision below departs from the "functional test" developed by this Court to assess whether a statutory scheme on its face evidences a punitive purpose. Although this Court has held that the statutory burdens imposed by the legislature need only "reasonably further" nonpunitive goals, the court below required a close fit between Chapter 190's nonpunitive purposes and its means. Second, this insistence on a close fit, as well as the Second Circuit's reliance on the alleged existence of "less burdensome alternatives," conflicts with the deference given Congress in similar cases by other circuits. Third, the Second Circuit's finding of "punishment"

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7. The only bill of attainder case from this Court to analyze an alleged modern confiscation of property was *Nixon*, which involved a statute that in part ordered the General Services Administration to retain control over President Nixon's personal papers. With respect to the President's claim that the statute involved the punitive confiscation of his property, the Court simply noted that the availability of a just compensation remedy in the statute undercut any such "colorable" claim. 433 U.S. at 475.

ignores this Court's precedent stressing that the separation of powers concerns underlying the Bill of Attainder Clause are not implicated when a legislature acts within its traditional sphere, as it did here by engaging in an element of ratemaking.

A. The Second Circuit's analysis departs from the "functional test" set forth by this Court for determining if a law imposes "punishment" for purposes of the Bill of Attainder Clause.

This Court has developed a three-part test for determining whether a law imposes punishment within the meaning of the Bill of Attainder Clause: (1) a historical test, which looks to the types of punishment traditionally imposed by bills of attainder; (2) a functional test, which asks whether the challenged law, in light of the type and severity of the burden imposed, reasonably furthers nonpunitive legislative purposes; and (3) a motivational test, which looks for evidence of a punitive purpose in the legislative history. *See Selective Service*, 468 U.S. at 852; *Nixon*, 433 U.S. at 473, 475-76, 478. Here, the court below conceded that Chapter 190 did not satisfy either the first or third prongs of this test,[8] and therefore focused its analysis on the second prong — the "functional test."

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8. The court noted that:

> [t]he only traditional punishment implicated here is punitive confiscation of property . . . [but] we are not certain that a "deprivation" is the same thing as a "confiscation," and indeed, the Supreme Court has held that an adverse utility-rate decision is not "confiscatory" for purposes of the Takings Clause unless it provides an overall unfair rate of return for the utility.

Consolidated Edison, 292 F.3d at 351 (citation omitted). The court further found that "the evidence of punitive intent in the legislative record in this case is insufficient on its own to justify a conclusion that Chapter 190 is punitive." *Id.* at 354-55.

The functional test considers the statutory scheme on its face, to determine "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive purposes." *Nixon*, 433 U.S. at 475. The absence of any legitimate legislative purpose provides evidence that the law was intended as punishment of those affected by it. *See id.* at 475-76 ("Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.").

As *Nixon* directs, in determining whether a challenged statute has a nonpunitive purpose, this Court has required only that a statutory burden *reasonably* serve the statute's nonpunitive goals. For example, in *Selective Service*, its most recent bill of attainder case, the Court characterized the applicable test as "whether the challenged statute can be *reasonably* said to further nonpunitive goals." 468 U.S. at 853-54 (emphasis added). There, the Court upheld the challenged legislation, which conditioned receipt of federal educational assistance on compliance with draft registration requirements, because the statute was "a rational means" to improve compliance and allocate government resources and thus clearly furthered these nonpunitive purposes. *See id.* at 853-56. Likewise, in *Nixon*, the Court found in the legislative scheme at issue no evidence of punitive intent, where the preservation of President Nixon's papers served legitimate and nonpunitive purposes. *See* 433 U.S. at 477-78; *see also Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (no evidence of punitive intent on face of statute where disqualification of certain deportees from social security benefits bears some "rational connection" to legislative purpose); *In re Extradition of McMullen*, 989 F.2d 603, 613 (2d Cir.) (en banc) ("the Supreme Court has indicated that only when a legitimate purpose is not apparent will the Court deem the purpose of the decisionmaker to be the punishment of the individual"), *cert. denied*, 510 U.S. 913 (1993).

And in the instances where this Court has found evidence of punitive intent under the "functional test," it has noted that the challenged law was not supported by *any* rational and nonpunitive purpose. *See Cummings*, 71 U.S. at 319-20 (striking down state constitutional provision requiring loyalty oath as imposing punishment where there is "no possible relation" between subject of oath and fitness for enumerated positions); *see also Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (upholding statutory qualifications governing practice of medicine that related to skill and knowledge of practitioner and distinguishing cases involving loyalty oaths that had no connection to fitness). *Cf. Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (plurality opinion) (holding that statutory forfeiture of citizenship upon conviction for desertion was penal for purposes of Eighth Amendment claim because statute lacked any rational purpose except to punish deserter).

The Second Circuit, however, disregarded this Court's legal standard, instead adopting a rule that requires invalidation of a statute if it does not have a *precise* fit between the statute's goals and burdens, or if no "wholly non-punitive purpose" can be discerned. *Consolidated Edison*, 292 F.3d at 351, 352-54.

The court below recognized that the cost disallowance imposed by Chapter 190 serves two legitimate and nonpunitive purposes: (1) a cost-allocation purpose, because it places the burden of unreasonably incurred costs on the party the Legislature found responsible for them, rather than on innocent ratepayers, and (2) an economic-regulatory purpose, because it promotes economic efficiency by encouraging Con Edison, a regulated monopoly, to avoid similar future costly errors. *See id.* at 351-53.

While acknowledging the legitimate and nonpunitive nature of these purposes, the court invalidated the statute based on its conclusions that Con Edison should have been

allowed to recover some percentage of its costs and that the Legislature could have enacted a more tailored, "less burdensome" statute. *Id.* at 352-54. It relied on its finding that Chapter 190 denies to Con Edison a *portion* of the replacement power costs (those attributable to time spent replacing the defective generators) that would have been incurred even in the absence of Con Edison's misconduct, concluding that denying Con Edison recovery of this unquantified percentage of the replacement power costs did not serve the statute's nonpunitive purposes. *See id.* at 353-54. Because it could "discern no wholly non-punitive purpose to justify the entire cost-pass-through prohibition in Chapter 190," the court found the statute itself provided evidence of a punitive purpose. *Id.* at 351, 352-54.

If the court below had applied the "functional test" set forth by this Court, instead of substituting a more rigorous standard, it would have concluded that the fit between Chapter 190's purposes and means is sufficient to avoid any implication of punitive intent. The Second Circuit recognized that Chapter 190 serves legitimate and nonpunitive purposes as a cost-allocation and economic regulatory measure. *See id.* at 352. It further found that these purposes are reasonably furthered by disallowing Con Edison the replacement power costs associated with the unplanned outage, since the Legislature found that Con Edison's unreasonable conduct in failing to timely replace the defective generators caused the outage. *See id.*

Moreover, as the court below acknowledged, the replacement power costs incurred by Con Edison in actually replacing the defective generators during this unplanned outage were not necessarily as low as the replacement costs it would have incurred if it had replaced the generators sooner during a planned outage. *See id.* at 353. Thus, even if the disallowance imposed by Chapter 190 were arguably overbroad, it still *reasonably* serves the statute's nonpunitive

cost-allocation and economic deterrence purposes and therefore does not evince a punitive purpose.[9]

The Second Circuit's disregard for this Court's articulation of the "functional test" was compounded by its analysis of the availability of "less burdensome alternatives." In applying the "functional test," the court found that Chapter 190 was punitive in part because the Legislature allegedly could have met its nonpunitive goals with a more narrowly-tailored law, one that limited the disallowance to reflect more accurately only the increase in power costs caused by Con Edison's failure to replace the defective generators at an earlier time, before they caused a leak and forced shutdown. *See* 292 F.3d at 354. This reliance upon "less burdensome alternatives" cannot be squared with this Court's bill of attainder precedents.

In *Nixon*, this Court stated that "in determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives." 433 U.S. at 482.[10] The Court's reference to "less burdensome alternatives" is found in its discussion and application of the third prong of the test for punishment, the "motivational test" in which the Court evaluates "whether the legislative record evinces a congressional

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9. The Second Circuit's reliance on the retrospective focus of Chapter 190 in concluding that the statute imposes punishment, *see* 292 F.2d at 349, is misplaced. This focus results directly from the nature of the fuel adjustment clause, which necessarily involves retrospective review of the reasonableness of the costs.

10. Notably, in *Nixon*, the Court considered, and rejected, the President's less burdensome alternatives argument "in light of the unique posture of this controversy." 433 U.S. at 482. The Court did not consider, or even mention, less burdensome alternatives in its subsequent decision in *Selective Service*, 468 U.S. 841.

intent to punish." *See id.* at 478. *Nixon*'s mention of "less burdensome alternatives" indicates only that a court may consider this question as one factor in determining whether the legislature intended to punish an individual, rather than to legitimately regulate his conduct. It clearly was not intended to change the "reasonably furthers" aspect of the Court's "functional test" into a "least restrictive means" test, which is essentially what the court below did. This Court's precedents require only that the burdens be *reasonably* proportionate to the statute's nonpunitive goals, not that they be the least burdensome means. This Court has never indicated that a law imposes punishment simply because the legislature could have designed a different statutory scheme more appealing to a reviewing court.

B. The Second Circuit's scrutiny of Chapter 190's purposes conflicts with the deference accorded legislatures by other circuits.

The narrow window of permissible legislative draftmanship afforded by the Second Circuit's decision conflicts not only with this Court's precedents, but with the substantial deference accorded to legislatures by other circuits. Unlike the Second Circuit, which seized on the belief that the Legislature's cost allocation could have been more exact and that a less-burdensome alterative to Chapter 190 existed, the Fifth and D.C. Circuits have acknowledged that a statute survives a Bill of Attainder challenge if *some* reasonable nonpunitive purpose is identified. *See Navegar*, 192 F.3d at 1068 (rejecting bill of attainder challenge where legislation does not exhibit "a *purely* punitive purpose" (emphasis added)); *BellSouth II*, 162 F.3d at 688-89 (rejecting challenge upon finding "convincing evidence of legitimate, nonpunitive purposes"); *BellSouth I*, 144 F.3d at 66 (asking whether "Congress cannot *rationally* be said to have pursued

nonpunitive purposes"(emphasis added)); *SBC*, 154 F.3d at 241 ("*Nixon* stands ultimately and concisely for the following proposition: if legislation has a legitimate nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause.").

Moreover, at least one circuit has directly concluded, contrary to the court below, that the Bill of Attainder Clause does not permit invalidation of a statute simply because the court might select a different, even less burdensome way to solve a problem:

> Congress may read the evidence before it in a different way than might this court or any other, so long as it remains clear that Congress was pursuing a legitimate nonpunitive purpose. In other words, it does not matter that Congress arguably could have enacted different legislation .... The main point here is that it cannot be legitimately suggested that the [asserted statutory purpose was] so feeble that no one could reasonably assert [it] except as a smoke screen for some invidious purpose.

BellSouth II, 162 F.3d at 689 (internal citation omitted); *see also SBC*, 154 F.3d at 241-42 ("prophylactic" legislation that imposes regulatory restrictions to protect the public from future bad acts is not prohibited by the Bill of Attainder Clause). Indeed, the D.C. and Fifth Circuits appear to have found the existence of any less burdensome alternatives relevant only to the third prong of the *Nixon* test (whether a legislature intended to punish an individual), rather than having any bearing on whether the statute furthers nonpunitive purposes and thus passes the "functional" test.

See BellSouth II, 162 F.3d at 689; *id.* at 696 (Sentelle, J., concurring in the result); *SBC*, 154 F.3d at 244.[11]

C. The Second Circuit's finding of punishment departs from this Court's precedents protecting the legislature's authority to act within its traditional sphere.

Finally, the Second Circuit's analysis departs from this Court's precedents that protect a legislature's authority to act within its traditional sphere without running afoul of the Bill of Attainder Clause. The court below ignored the fact that the Legislature was engaged in legitimate regulation, rather than punishment, in enacting Chapter 190. This error, if left undisturbed, could embolden utilities to transform quantification disputes into constitutional claims in contravention of this Court's teachings.

The court below failed to recognize that in safeguarding ratepayers from the effects of imprudent action by Con Edison, the Legislature was addressing a purely legislative concern. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) ("We have never doubted that state legislatures

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11. In earlier decisions, the Second Circuit likewise considered the existence of legislative alteratives in connection with the motivational test. *See In re Extradition of McMullen*, 989 F.2d 603, 613 (2d Cir. 1993) (en banc); *id.* at 619 (Altimari, J., concurring in part & dissenting in part); *McMullen v. United States*, 953 F.2d 761, 767-68 (2d Cir. 1992) (panel decision), *rev'd on other grounds*, 989 F.2d 603 (2d. Cir. 1993) (en banc); *see also Springfield Armory, Inc. v. City of Columbus*, 805 F. Supp. 489, 495 (S.D. Ohio 1992), *rev'd on other grounds*, 29 F.3d 250 (6th Cir. 1994). *But cf. United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1227-28 (D. R.I. 1982) (indicating that court should consider motivation of legislature and, where statute unambiguously imposes punishment, existence of less burdensome alternatives in determining whether punishment furthers nonpunitive end).

are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature." (citing *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion.")).

This Court has held that the Bill of Attainder Clause was not designed to limit the legislature when it is acting within its traditional legislative sphere; rather, it was intended to protect against encroachment by the legislature into the *judicial* function of determining guilt and imposing punishment on an individual basis. *See Flemming*, 363 U.S. at 616 ("Where no persuasive showing of a purpose 'to reach the person, not the calling,' has been made, the Court has not hampered legislative regulation of activities within its sphere of concern, despite the often-severe effects such regulation has had on the persons subject to it." (quoting *Cummings*, 71 U.S. at 320)); *Brown*, 381 U.S. 437, 442 ("the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature"). But these separation of powers concerns are not implicated when the legislature is involved in an aspect of ratemaking, which has never been a judicial function. *See Newton v. Consolidated Gas Co. of N.Y.*, 258 U.S. 165, 177 (1922) ("Rate making is no function of the courts and should not be attempted either directly or indirectly.").

Only by ignoring the Legislature's legitimate concern in rate matters and by improperly extending this Court's precedents was the court below able to conclude that Chapter 190 violates the Bill of Attainder Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JUNE 5, 2002

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2000

(Argued May 21, 2001 Decided June 5, 2002)

Docket Nos. 00-9358(L), 00-9426(CON), 00-9442(CON)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff-Appellee,

—v.—

GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, MAUREEN O. HELMER, in her official capacity as Chairman of the New York State Public Service Commission, THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD D. WEISS and NEAL N. GALVIN in their official capacities as Commissioners of the New York State Public Service Commission,

Defendants-Appellants,

RICHARD L. BRODSKY, New York State Assembly Member and SHELDON SILVER, New York State Assembly Speaker,

Intervenors-Defendants-Appellants.

Appendix A

Before:

WALKER, *Chief Judge*, JACOBS, *Circuit Judge*,
LARIMER, *Chief District Judge.**

Defendant state officials appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, District Judge) permanently enjoining enforcement of a state statute against plaintiff Consolidated Edison Company of New York, Inc. on the grounds that the statute violate the Equal Protection Clause of the Fourteenth Amendment and the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution.

Affirmed and remanded for correction of judgment.

* * *

JOHN M. WALKER, JR., *Chief Judge:*

Defendant state officials appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *District Judge*) permanently enjoining enforcement of a New York state statute against plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") on the grounds that the statute violated the Equal Protection Clause of the Fourteenth Amendment and the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution. We affirm solely on the basis of Art. I, § 10, but remand to the district court to correct a scrivener's error in the judgment.

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* The Honorable David G. Larimer of the United States District Court for the Western District of New York, sitting by designation.

Appendix A

BACKGROUND

Plaintiff Con Ed is a public utility that provides electrical power to New York City. Among Con Ed's power plants is the Indian Point 2 Nuclear Generating Facility ("IP2") located in Westchester County, New York. The statute at the heart of this appeal was enacted in response to a power outage at IP2 caused by a defective generator.

Until recently, IP2 produced electricity with four "Model 44" steam generators that Con Ed had purchased from the Westinghouse Corporation ("Westinghouse") in 1972. In the late 1970s, Westinghouse learned that the steam generator tubes on both its Model 44 and 51 steam generators were subject to corrosion and failure. By 1997, seven of the eight nuclear power plants using the Model 44 had replaced their generators. Although other power plants apparently continued to use the similarly flawed Model 51 steam generators, only IP2 continued to use the flawed Model 44 generators. Con Ed purchased replacement generators for IP2 in 1985, but, prior to the incident at issue in this litigation, had never installed them.

On February 15, 2000, a steam tube in one of IP2's Model 44s developed a crack which released radioactive steam into the surrounding nonradioactive water that is converted to steam to turn IP2's power-generating turbines. A subsequent investigation by the federal Nuclear Regulatory Commission ("NRC") and the New York State Public Service Commission ("PSC" or "the Commission") revealed no evidence of elevated radiation levels offsite due to the incident. The cracked tube was promptly discovered and Con Ed took

IP2 offline to replace the generator. By January 2001, it had finished replacing the damaged generator with one purchased in 1985 and restarted IP2. To cover electricity demand while IP2 was offline, Con Ed was forced to purchase electricity from other sources.

Con Ed operates IP2 in a complex regulatory environment. The public health and safety aspects of its operations are regulated by the NRC under the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (1994). The rates that Con Ed charges its customers are regulated by the PSC, an independent state regulatory body created early in the twentieth century.

A 1997 settlement agreement resolved a number of outstanding disputes between Con Ed and the PSC that have no bearing on this appeal. The agreement amended Con Ed's rate and was adopted in the form of a rate order by consent. Of relevance to this appeal, the agreement includes a so-called "fuel adjustment clause" ("FAC"), which allows Con Ed to pass certain costs along to its ratepayers in the form of temporary rate increases. Con Ed's authority to pass costs through to ratepayers under the FAC is subject to statutory review by the PSC to determine whether those costs are prudently or "reasonably" incurred, in order to ensure just and reasonable rates. N.Y. Pub. Serv. Law § 66(12)(k) (2001); *see Long Island Lighting Co. v. Pub. Serv. Comm'n*, 523 N.Y.S.2d 615, 620 (N.Y. App. Div. 1987). The PSC is empowered to bar Con Ed from passing imprudently incurred costs along to ratepayers and to force the utility to refund imprudently incurred costs already recouped. N.Y. Pub. Serv. Law § 66(12)(k) (2001).

Appendix A

Pursuant to the FAC, Con Ed increased its rates to incorporate the cost of purchasing replacement electricity and the other costs associated with the outage. Soon after the incident, the PSC staff began a prudence investigation of the IP2 outage, and on March 30, 2000, the PSC itself initiated a prudence review. It is our understanding that this review is still incomplete as of the issuance of this opinion.

On February 18, 2000, three days after the outage, the New York State Assembly issued a notice of a joint public hearing of the Assembly Committees of Energy, Environmental Conservation, and Corporations, Authorities, and Commissions, to be held on a variety of topics related to the outage and Con Ed's operation of IP2. The notice listed potential topics including: the environmental effects of the incident, deterioration of facilities at IP2, the need for greater regulatory oversight of nuclear power in New York, and the potential sale of the IP2 plant. The hearing was held on March 3, 2000, and it covered the range of topics listed in the notice. Con Ed's Chief Operating Officer, J. Michael Evans, and its Vice President of Maintenance and Construction, Stephen Quinn, testified. They later supplemented their testimony in a six-page letter to several members of the committee.

On March 20, 2000, intervenors-defendants Representatives Brodsky and Silver introduced the bill that is the subject of the present lawsuit. *See* A. 10096, 2000 Assembly (N.Y. 2000). One week later, on March 27, the Assembly and Senate passed the bill without amendment. Governor Pataki signed it into law on August 8 as Chapter 190 of the Laws of 2000

("Chapter 190"). *See* Act of Aug. 8, 2000, ch. 190, 2000 N.Y. Laws, (hereinafter, 2000 N.Y. Laws 190). Chapter 190 reads, in full, as follows:

> § 1. Declaration of legislative findings. The operator of a nuclear generating facility has a high duty of care to protect the health, safety and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.
>
> By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility.
>
> § 2. With respect to the February 15, 2000 outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility. Such prohibition shall apply to any such costs incurred until the conclusion of such outage,

> or incurred at any time until all defective steam generation equipment at the facility has been replaced, whichever occurs later. Such prohibition shall apply to automatic adjustment mechanisms as well as base rates or any other rate recovery mechanism. The commission shall order the company to refund any such costs which have been recovered from ratepayers.
>
> § 3. This act shall take effect immediately.

The PSC has estimated that Con Ed would have been able to pass on to its customers approximately $250 million in increased costs that Chapter 190 requires it to internalize.

On August 14, 2000, Con Ed filed suit in the District Court for the Northern District of New York, seeking a declaratory judgment and permanent injunction barring enforcement of the statute on various constitutional grounds and on August 17 moved for a preliminary injunction. Con Ed alleged that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Bill of Attainder Clause of Article I, Section 10, the Due Process Clause of the Fourteenth Amendment (alleging a violation of procedural due process and an uncompensated taking), the Supremacy Clause, and the Contracts Clause of Article I, Section 10. On September 6, 2000, the district court granted a motion by Representative Brodsky, a member of the Assembly, and Representative Silver, the speaker of the Assembly, to intervene in the suit.

Appendix A

In a memorandum order dated October 10, 2000, the district court granted Con Ed's request for a permanent injunction and denied as moot Con Ed's motion for a preliminary injunction. *Con Ed v. Pataki*, 117 F. Supp. 2d 257 (N.D.N.Y. 2000). The district court agreed with Con Ed that the statute violated the Equal Protection Clause, finding that Chapter 190 was not rationally related to the state's legitimate interest in deterring negligence at nuclear power plants. *Id.* at 262-65. The district court also held that Chapter 190 constituted an impermissible Bill of Attainder because the statute named Con Ed and was the product of a legislative intent to punish Con Ed. *Id.* at 265-71. The court expressly refused to reach Con Ed's other constitutional claims. After judgment was entered on December 4, 2000,[1] the defendants appealed.

DISCUSSION

Because we conclude that Chapter 190 is an unconstitutional bill of attainder, we affirm the district court. We need not and do not address Con Ed's other constitutional theories.[2]

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1. The judgment incorrectly, and incomprehensibly, stated that "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff." We accordingly remand for correction of this obvious scrivener's error. *See infra*, Part II.

2. We thus do not decide whether Chapter 190 violates the Equal Protection Clause, which supplied one basis for the district court's injunction. We are skeptical, however, that the Clause would require invalidation of Chapter 190: "[M]ere underinclusiveness is not fatal to the validity of a law under . . . equal protection[,] even if the law disadvantages an individual or identifiable members of a group."

(Cont'd)

Appendix A

I. The Bill of Attainder Clause of Article I, Section 10

The Constitution includes two clauses prohibiting enactment of "bills of attainder": Section 9 applies to Congress, Section 10 to the states. *See* U.S. Const. art. I, §§ 9, 10. The history of bills of attainder and of pains and penalties in England,[3] which gave rise to the constitutional prohibitions in § 9 and § 10, has been aptly described elsewhere, and we see no need to reiterate it here. *See In re Extradition of McMullen*, 989 F.2d 603, 604-06 (2d Cir. 1993) (in banc). Briefly stated, a constitutionally proscribed bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977); *see also United States v. Lovett*, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."). Put another way,

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(Cont'd)

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 471 n.33 (1977) (internal citations omitted). To be so invalidated, the classification must have "no rational basis," *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and we doubt that the present statute meets that standard.

3. In English practice, bills of attainder imposed the death penalty. Other, less severe punishments were imposed by "bills of pains and penalties." The Supreme Court has held that the constitutional prohibition reaches both. *See United States v. Brown*, 381 U.S. 437, 447 (1965); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

the Clause bars the imposition of punishment resulting from "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965).

Under the definition quoted above from *Nixon*, a statute can be a bill of attainder only if (1) it "determines guilt and inflicts punishment," (2) "upon an identifiable individual," and (3) "without provision of the protections of a judicial trial." *Nixon*, 433 U.S. at 468. In the present case, the lack of a judicial trial is incontrovertible. Chapter 190 was enacted by the state legislature using purely legislative processes, without any additional protections akin to those present in a judicial trial. At issue, then, are only the questions of whether (1) Con Ed, singled out as it was by Chapter 190, is an "individual" that may invoke the protection of the Clause, (2) Chapter 190 "determines guilt," and (3) Chapter 190 "inflicts punishment." We answer all three questions in the affirmative.[4]

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4. Our analysis is unaffected by separation of powers principles, on which the district court relied heavily, 117 F. Supp. 2d at 268, citing *Brown*, 381 U.S. at 441, 443-45. *Brown* was decided under the Clause applicable to Congress in Article I, § 9, not that in § 10, which applies to the states. *Brown's* statements about separation of powers doctrine are inapplicable to the § 10 Bill of Attainder Clause for the simple reason that the federal Constitution does not impose any particular separation of powers requirement on state governments: "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *see also Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.") (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter,

(Cont'd)

Appendix A

A. The Clause's Applicability to Corporations

Chapter 190 unquestionably singles out Con Ed: the utility is expressly named in the statute. The legislator defendants argue, however, that the Bill of Attainder Clause applies only to legislation that targets natural persons, not corporations such as Con Ed. We disagree.

Although a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law," *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819), a wide variety of constitutional rights may be asserted by corporations. *See, e.g., Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (equal protection); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (reasonable search and seizure); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (double jeopardy); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (freedom of speech). Nevertheless, not all constitutional protections apply to corporations or apply as fully as they do to natural persons. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950) (privacy); *Wilson v. United States*, 221 U.S. 361, 382-86 (1911) (Fifth Amendment

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(Cont'd)

J., concurring)); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate . . . is for the determination of the state."). Indeed, where § 10 is involved, our concern for the independent operation of each of the branches of government must be tempered by our concern about preserving to the states the choice of government structures. *See* 1 Laurence H. Tribe, *American Constitutional Law* § 2-4, at 132-33 (3d ed.2000).

privilege against self-incrimination). The distinction between rights that may be asserted by corporations and those that may not is that "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79 n.14 (1978). Whether a right is purely personal "depends on [its] nature, history, and purpose." *Id.*

The applicability of the Bill of Attainder Clause to corporations remains unsettled in every circuit. Without directly ruling on the question, the Supreme Court has stated, without discussion, that the Clause provides "protections for individual persons *and private groups*, those who are peculiarly vulnerable to nonjudicial determinations of guilt," *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (emphasis added). A corporation shares some of the characteristics of a "private group," but we need not decide whether corporations are included within the category of private groups because the reference to private groups plainly contemplates protection for some entities in addition to individual natural persons. The Court has also indicated in dictum that a bill of attainder may target a "single individual *or firm*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (emphasis added). No Court of Appeals has held as much, though several have expressly assumed without deciding that the Clause is applicable to corporations, finding the Clause inapplicable in the particular cases for other reasons. *See Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir. 2000); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1065 (D.C. Cir. 1999); *SBC Communications, Inc. v. FCC*,

154 F.3d 226, 234 & n.11 (5th Cir. 1998). For several reasons, we think the protection afforded by the Bill of Attainder Clauses is not a " 'purely personal' guarantee[ ]" and therefore is one of the constitutional rights enjoyed by corporations.

First, the "historical function" of the Clause has been to ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment. *See Nixon*, 433 U.S. at 468-69; *Brown*, 381 U.S. at 442, 445; *Lovett*, 328 U.S. at 316-17; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866). That guarantee is closely related to the right to procedural due process. *See Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468-69 (7th Cir. 1988) (discussing the relationship between procedural due process rights and the prohibition on bills of attainder); *see also Screws v. United States*, 325 U.S. 91, 106 (1945) (stating that "it is plain that basic to the concept of due process of law in a criminal case is a trial — a trial in a court of law".) The right to procedural due process has been applied to corporations. *See, e.g., Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413-19 (1984).[5]

Second, the cases in which the Court has refused to apply constitutional rights to corporations have uniformly involved competing state interests in regulating corporate conduct and investigating corporate wrongdoing, which depend on a high degree of transparency. *Wilson v. United States*, in which the Court held the Fifth Amendment privilege against self-

5. Although less closely analogous, the Sixth Amendment right to trial by jury in criminal cases has also been applied to corporations in this Circuit. *See United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 663 (2d Cir. 1989).

incrimination inapplicable to corporations, rested its holding primarily on the "visitatorial power" that remains vested in the state after it grants a corporation its charter. *See* 221 U.S. at 382-84. Likewise, in *United States v. Morton Salt Co.*, the Court justified its decision that corporations enjoy narrower rights to privacy by the state's interest in investigating corporate wrongdoing: "law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." 338 U.S. at 652. Unlike visitatorial powers which do not directly affect the bottom line, punishment necessarily affects shareholder assets. Although New York unquestionably has an interest in investigating, regulating, and prosecuting the malfeasance of corporations within its borders, it has no interest in inflicting punishment for such malfeasance on the corporation's shareholders through the legislative process. Indeed, in the instant circumstances, a "law-enforcing agency," the PSC, has an existing administrative procedure to vindicate the interest in exploring utilities' wrongdoing: the prudence review process. That process addresses the state's interest in investigating and punishing utilities' misfeasance, and to the extent it does not do so adequately, the legislature may enact generally applicable legislation modifying that process.

Because punishment can frequently take the form of economic injury, a comparison with the Takings Clause of the Fifth Amendment is apt. The protection against targeted economic injury in the Takings Clause is fully applicable to corporations. *See, e.g., United States v. 91.90 Acres of Land*, 586 F.2d 79, 85-86 (8th Cir. 1978). For both the Takings Clause and the Bill of Attainder Clauses, if the protections

did not extend to corporations, their protections would be significantly undermined for individuals. When a corporation suffers an economic injury, its shareholders suffer the same economic injury. In order to protect shareholders from the economic injuries prohibited by the Takings Clause and the Bill of Attainder Clauses, corporations must be allowed to raise the clauses directly.

We have been unable to unearth any case in which a corporation has ultimately prevailed in challenging legislation as a bill of attainder — cases finding a bill of attainder targeting any party are extraordinarily rare. Nevertheless, bills of attainder historically have targeted corporations as well as natural persons. Con Ed cites several English statutes that imposed disabilities on English boroughs, hardly natural persons. *See*, *e.g.*, 1 & 2 Geo. 4, c.47 (Eng. 1821). Moreover, one of the types of punishment most frequently imposed by bills of pains and penalties, punitive confiscation of private property, *see Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984), is one that may injure a corporation in the same way it injures an individual. *Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284-85 (1989) (O'Connor, J., concurring in part and dissenting in part) (arguing that Eighth Amendment Excessive Fines Clause applies to corporations, in part because a corporation, as an entity, may be subject to such penalties).

We therefore hold that corporations must be considered "individual[s]," *Nixon*, 433 U.S. at 468, that may not be singled out for punishment under the Bill of Attainder Clause in Article I, Section 10.

B. Retrospective Focus: Guilt

Another indispensible element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct. *See Nixon*, 433 U.S. at 472-73; *Cummings*, 71 U.S. (4 Wall.) at 325. Such a bill attributes guilt to the party or parties singled out in the legislation. *See Nixon*, 433 U.S. at 468; *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt."); *Cummings*, 71 U.S. (4 Wall.) at 323 (in enacting a bill of attainder "the legislative body . . . assumes . . . judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial").

Although on its face Chapter 190 does not speak in terms of guilt or innocence, we have no doubt that the legislature considered Con Ed guilty of wrongdoing in allowing the IP2 outage to occur. The primary evidence of this is the statute's focus on Con Ed's conduct related to a single, past incident, the IP2 outage, as the basis for the sanction it imposes. Chapter 190 makes explicit findings about the outage and concludes that "the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers." 2000 N.Y. Laws 190 § 1. The legislature's response is also limited to the IP2 incident, prohibiting Con Ed from "recovering from its ratepayers any costs associated with replacing the power from such facility." 2000 N.Y. Laws 190 § 2. The statute thus imposes liability "determined by no previous law or fixed rule." *Lovett*, 328 U.S. at 317 (internal quotation marks

omitted). Although an established procedure existed for determining whether Con Ed had been "imprudent" in incurring the costs associated with the outage, the legislature bypassed it and, in a single stroke, found guilt on the facts of Con Ed's case. The legislature, as the source of the PSC's authority, retains the power to reclaim authority over rate-setting from the PSC. However, the decision to bypass the PSC reinforces our conclusion that the legislature's decision was to find guilt and order punishment directly.

The retrospective focus of Chapter 190 is essential to our determination that the statute is a bill of attainder. The power of legislatures to enact purely prospective changes to utility rates, even to the rates of a single utility, is considerably broader than their authority to act retrospectively.

C. Punishment

To invalidate legislation as a bill of attainder, the Bill of Attainder Clause "requires not merely 'singling out' but also *punishment.*" *Plaut*, 514 U.S. at 239 n.9; *accord Nixon*, 433 U.S. at 471-72 & n.33 (holding that "the Act's specificity — the fact that it refers to appellant by name — does not automatically offend the Bill of Attainder Clause"). A legislature may legitimately create a "class of one" for many purposes, *see, e.g.*, *Nixon*, 433 U.S. at 472-73, but not for punishment. We therefore must ascertain whether Chapter 190 punishes Con Ed.

Punishment of wrongdoing is, of course, a legitimate state interest reflected in the penal laws of the fifty states. Where a statute establishing a punishment declares and

imposes that punishment on an identifiable party, however, the Bill of Attainder Clauses undermine the usual solicitude we have for such purposes. In such cases, we look beyond simply a rational relationship of the statute to a legitimate public purpose for "less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives." *Nixon*, 433 U.S. at 482.

Legislated punishment is not always easy to identify outside the traditional punishments of death or incarceration. Neither "the fact that harm is inflicted by governmental authority," *Lovett*, 328 U.S. at 324 (Frankfurter, J., concurring), nor "the severity of [the] sanction is . . . determinative of its character as 'punishment,' " *Flemming v. Nestor*, 363 U.S. 603, 616 n.9 (1960). Indeed, as traditionally conceived, punishment implicates a variety of values that, in other contexts, bear no necessary relation to punishment. For example, a judicial order of compensation in a negligence action imposes "harm" on the defendant — he must pay the damage award — but that harm is merely compensatory for the plaintiff's injury, not punitive. Compensation may be part of a punishment, on the other hand, as where a criminal defendant is ordered to make restitution to his victim. Similarly, deterrence may be a legitimate, nonpunitive goal, such as deterrence of unreasonable conduct produced by a damages award for negligence — but it is also a core component of punishment. *See, e.g., Brown*, 381 U.S. at 458. Retribution may be one value that is limited to the arena of punishment, but it is not a necessary part of "punishment." *See Selective Serv. Sys.*, 468 U.S. at 851-52; *Brown*, 381 U.S. at 458 ("It would be archaic to limit the definition of 'punishment' to 'retribution.' ").

Appendix A

The Supreme Court articulated three factors to guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [legislative] intent to punish.' " *Selective Serv. Sys.*, 468 U.S. at 852 (quoting *Nixon*, 433 U.S. at 473, 475-76, 478). *Nixon* makes it clear that a statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim. *Nixon*, 433 U.S. at 473-78. The party challenging the statute has the burden of "establish[ing] that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." *Id.* at 476 n.40. Unfortunately, because the Supreme Court's bill of attainder jurisprudence is limited, it provides us with little guidance for determining whether a statute is impermissibly punitive.

1. Traditional Punishments

We look first to the "infamous history of bills of attainder" to determine whether Chapter 190 imposes the sorts of "deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of [the Clause]." *Id.* at 473. Some types of legislatively imposed harm, in other words, are considered to be punitive per se. The classic example is death, but others include "imprisonment, banishment, . . . the punitive confiscation of

property[, and prohibition of] designated individuals or groups from participation in specified employments or vocations." *Id.* at 473-74; *accord Selective Serv. Sys.*, 468 U.S. at 852.

The only traditional punishment implicated here is punitive confiscation of property. On the one hand, Chapter 190 clearly deprived Con Ed of a property interest by prohibiting the ordinarily permitted pass-through of costs. All told, Chapter 190 deprives Con Ed of approximately $250 million that it would otherwise have been able to obtain from its customers. On the other, we are not certain that a "deprivation" is the same thing as a "confiscation," and indeed, the Supreme Court has held that an adverse utility-rate decision is not "confiscatory" for the purposes of the Takings Clause unless it produces an overall unfair rate of return for the utility. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 310, 313-14 (1989).

A statute need not fit within the historical category of punishment to be considered such. Such a rule would render the Clauses unable to respond to attempts by contemporary legislatures to punish individuals in new and heretofore unforeseen ways. *See Nixon*, 433 U.S. at 475. We need not resolve this close question to conclude that Chapter 190 is nonetheless a bill of attainder. Accordingly, we do not decide whether Chapter 190 imposes a traditional attainder and turn instead to the next component of the test.

2. The "Functional" Test: Nonpunitive Statutory Goals

The second component of the Supreme Court's test is "functional," looking to

> whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes. . . . Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Id.; see also Flemming, 363 U.S. at 615 (describing "inability to discern any alternative [nonpunitive] purpose which the statute could be thought to serve" as a basis for finding a statute to be punitive) (citing *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion)); *Brown*, 381 U.S. at 476 (White, J., dissenting) ("The imposition of a particularly harsh deprivation without any discernible legitimate legislative purpose has . . . been characterized as penal."). In doing so, we "inquire into the existence of less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives." *Nixon*, 433 U.S. at 482. Try as we may, we can discern no wholly non-punitive purpose to justify the entire cost-pass-through prohibition in Chapter 190.

To be sure, part of the statute's cost-pass-through prohibition has an arguably non-punitive purpose. By preventing Con Ed from passing through the costs associated with the IP2 outage that it would not have incurred ordinarily, the legislature

prevented Con Ed's ratepayers from being forced to bear costs that the legislature viewed as negligently incurred. Con Ed would be forced to compensate its ratepayers for costs passed through prior to Chapter 190's enactment and could not force ratepayers to bear any further pass-throughs due to the IP2 outage. This is not necessarily a punitive purpose. The legislature could legitimately conclude that, as between Con Ed, the party that caused the outage, and the ratepayers, parties having nothing whatsoever to do with the outage, Con Ed should bear the costs attributable to its negligence. The legislature could decide that it would be unfair to force ratepayers to absorb the costs of Con Ed's error. If such a conclusion were reached by a court in a negligence action, for instance, no one would reasonably conclude that the court had "punished" Con Ed.[6] This is a distributional fairness rationale that has nothing inherently to do with punishment.

Nevertheless, eliminating harm to innocent third parties is a purpose consistent with punishment. *See Brown*, 381 U.S. at 458 (noting that "[a] number of English bills of attainder were enacted for preventive purposes"). However, because there is a clear non-punitive component to cost-allocation, we think that, if that were all that Chapter 190 did, it would be insufficient to justify a conclusion that the statute punishes Con Ed.

Chapter 190 also functions to deter similar conduct by Con Ed and other public utilities in the future. By forcing

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6. Indeed, in tort, a punitive damages award would be inappropriate for a finding of mere negligence. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, at 9-10 (5th ed. 1984).

Con Ed to absorb the costs of the outage, the statute encourages Con Ed and other utilities to be more diligent thereafter in avoiding similar outages. In this respect, Chapter 190 serves an economic-regulatory function. As a regulated monopoly, Con Ed does not face the same incentives to minimize costs as does an actor in a competitive market. Indeed, that fact is the basic justification of regulation of such monopolies: the state may act to encourage the monopoly to minimize costs as if it were faced with competition. *See* Paul A. Samuelson & William D. Nordhaus, *Economics* 520-21 (12th ed. 1985). Chapter 190 can be viewed, in part, as accomplishing that regulatory function, enhancing economic efficiency rather than punishing Con Ed for wrongdoing. State regulation of utilities to promote economic efficiency is a longstanding and unquestionably legitimate goal of state legislation. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989) (" '[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.' ") (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)) (alteration in original).

Chapter 190 might also deter negligent conduct with an eye toward protecting public health; the legislative findings in Chapter 190 focus to a considerable extent on the "potential threats to public health and safety" from nuclear power plant accidents. 2000 N.Y. Laws 190 § 1. All other things being equal, this would be an ample justification for the deterrent function of Chapter 190. However, the field of public health and safety regulation of nuclear power generation has been occupied by Congress through the Atomic Energy Act,

42 U.S.C. §§ 2011 *et seq.*, and therefore any regulation in that area by the states is preempted. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206-07, 212 (1983); *Suffolk County v. Long Island Lighting Co.*, 728 F.2d 52, 59-60 (2d Cir. 1984). Consequently, we cannot consider public health and safety as a valid, non-punitive justification for Chapter 190.

General and specific deterrence are also traditional justifications for punishment, however. *See Selective Serv. Sys.*, 468 U.S. at 851-52 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."); 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 1.5(a)(1), (4) (1986). If the entirety of the cost-pass-through prohibition served the economic-regulatory function described above, we might be willing to conclude that Chapter 190's deterrent function was non-punitive. Our view of the "type and severity of burdens imposed," *Nixon*, 433 U.S. at 475, by Chapter 190, however, leads us to a different conclusion.

Our reading of the record and statements made by counsel at oral argument indicate that some indefinite but quite substantial proportion of the costs that Con Ed has sought to pass through to its ratepayers that are denied by Chapter 190 could have been passed through unchallenged if Con Ed had installed the new generators in the ordinary course of business at any time after they received them in 1985. To install new generators, Con Ed must take IP2 offline for an extended period of time. During this period, Con Ed must purchase power on the open market to cover the lost generating capacity at IP2. Further, Con Ed would have to pay the cost

of labor and parts necessary to remove the old generators and install the new ones. These costs would be incurred whenever the generators are replaced, whether during scheduled maintenance prior to the generators' failure or, as here, after that failure had occurred. Such costs are ordinary to the business and thus may be ordinarily passed through.

Of course, there would be some differences in the costs incurred during a scheduled outage and those incurred during an accidental outage. The failure might cause damage to other facility components, which would need to be repaired or replaced. There may be some differences in the cost of labor between a scheduled and unscheduled replacement: for instance, Con Ed might be required to pay more overtime to workers in the event of an unplanned outage. The cost of power would also likely differ between the time at which a scheduled outage could have occurred and the time at which the accidental outage occurred. Indeed, if Con Ed had replaced the generators during a planned outage, it presumably would have intentionally timed the outage to coincide with a period of reduced energy prices. The bulk of the labor and power-replacement costs under either scenario, however, appear to be the same.[7]

It is undisputed that Con Ed would have been allowed to pass through to ratepayers the costs of covering power demand while replacing the generators during a scheduled outage. What, then, we must ask, other than punishment can justify forcing Con Ed to absorb those same costs after the

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7. Although the district court found this to be the case, it did not make findings about the exact amount of these costs. 117 F. Supp. 2d at 270.

accidental outage? Neither of the legitimate purposes set out above — prevention of harm to ratepayers and deterrence of inefficient, monopolistic conduct — can justify preventing Con Ed from passing these costs along to ratepayers. It does not protect ratepayers from, or compensate them for, new unjustified costs, because those costs would have been incurred even if Con Ed had acted as a prudent, model corporate citizen. Nor does it deter Con Ed or other utilities from incurring excess costs in the future: if Con Ed were faced with precisely the same situation in the future, it might be discouraged from delaying the installation of replacement generators, but in acting more quickly it would incur substantially the same costs that it now is being precluded from passing through to its ratepayers. There is no connection between these costs and the sort of lax monopolistic conduct that utility regulation would ordinarily seek to deter.

Moreover, there are plainly "less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives." *Nixon*, 433 U.S. at 482. The legislature easily could have tailored Chapter 190 to exclude from the pass-through prohibition those substantial costs that would have been incurred absent misconduct on Con Ed's part. For instance, it could have limited the pass-through prohibition to the incremental cost of energy beyond that prevailing when the replacement generators were purchased and any costs associated with the unplanned nature of the accidental outage such as overtime pay and damage to other facility components. Although we do not mean to hold that these costs need to have been identified with surgical precision, the legislature in this case made no attempt whatsoever to ensure that the costs imposed on Con Ed were

proportional to the problems that the legislature could legitimately seek to ameliorate. Rather, by lumping all costs of the outage together and forcing Con Ed to absorb them, the legislature piled on a burden that was obviously disproportionate to the harm caused.

Whether a government action is punishment varies depending on context. There may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation. Similarly, the government may have more flexibility to take actions that affect public utilities than it does when dealing with corporations in competitive markets. We need not explore this issue further to resolve this case, however, because Chapter 190 demonstrates a punitive intent even though it applies to a public utility corporation.

3. Indicia of Punitive Legislative Intent

Finally, we look to see whether the legislative history evinces a legislative intent to punish. *See Selective Serv. Sys.*, 468 U.S. at 852 (citing *Nixon*, 433 U.S. at 478); *Brown*, 381 U.S. at 476 (White, J., dissenting). The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish. *See Flemming*, 363 U.S. at 617 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]"); *see also, e.g., Lovett*, 328 U.S. at 308-12 (recounting extensive evidence of punitive intent in the legislative record). Statements by a smattering of legislators "do not constitute [the required] unmistakable evidence of

punitive intent." *Selective Serv. Sys.*, 468 U.S. at 856 n.15 (internal quotations omitted). Although the evidence of punitive intent in the legislative record in this case is insufficient on its own to justify a conclusion that Chapter 190 is punitive, the legislative history does contain some explicit evidence of punitive intent. That legislative history bolsters our prior conclusion that a significant portion of Chapter 190's cost-pass-through prohibition is plainly punitive.

Our reading of the legislative history indicates that certain legislators unquestionably intended to punish Con Ed: there are clear references by two senators to punishment and penalties. A sponsor of the legislation, Senator Velella, stated: "Con Edison has done a terrible thing here. . . . And Velella's law is going to stop them and punish them." A. 10096, N.Y. Senate Debate Transcript, at 3906-07 (2000) (statement of Sen. Velella); *see also* A. 10096, N.Y. Senate Debate Transcript, at 3912 (2000) (statement of Sen. Oppenheimer) (arguing that Con Ed "should certainly be penalized").

The statements of a few legislators are plainly not overwhelming evidence of penal intent, and if that were the only evidence that the statute is punitive, we would have no trouble holding that the statute is not a bill of attainder. But the stated intent of at least some legislators — most notably one of the floor managers of the legislation — to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.

Appendix A

D. Severability

Chapter 190 is not susceptible to severance of constitutional provisions from unconstitutional provisions because it contains only a single unitary provision. We are disinclined to rewrite the legislation to fashion a rule that the legislature never intended by attempting to identify and sever those costs Con Ed may constitutionally be prevented from passing through from the rest. In addition, because the punitive intent of some portions of Chapter 190 is clear, we conclude that all of Chapter 190 is a bill of attainder, absent clear evidence that some severable section was passed without punitive intent. Because no such evidence exists and the statute is a unitary provision that resists severability analysis, we invalidate Chapter 190 in its entirety.

In finding Chapter 190 to be a bill of attainder, we are mindful of the infrequency with which this constitutional provision has been used to strike down legislation. That rarity is attributable to the extraordinary scarcity of legislation of the type presented in Chapter 190. When faced with a bill that is so exceptionally narrow in scope, manifestly retrospective in focus, and unavoidably punitive in operation, we cannot allow it to stand, notwithstanding the heavy presumption of legitimacy that is ordinarily accorded legislative decisions. In such circumstances we are reminded of Alexander Hamilton's reflection on the function of judicial review in *Federalist* 78:

[A] limited constitution [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post

facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, at 466 (Hamilton) (Clinton Rossiter, ed., 1961) (italics removed).

II. Scrivener's Error in the Judgment

Although we affirm, we must remand to the district court with direction to correct the obvious scrivener's error on its judgment form, indicating that "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff and against the Defendants; and it is FURTHER ORDERED, that the plaintiff's motion for a permanent injunction is GRANTED." *Cf. United States v. Latorre-Benavides*, 241 F.3d 262, 264 (2d Cir.) (per curiam) (affirming but remanding to correct typographical error in judgment), *cert. denied*, 532 U.S. 1045 (2001).

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby affirmed. The case is remanded to the district court to conform the judgment to the substance of the district court's disposition. The district court shall strike the words "the case is DISMISSED in its ENTIRETY, in favor of the Plaintiff . . ." and replace them with "JUDGMENT is GRANTED, in favor of the Plaintiff . . ." Costs are awarded to the Plaintiff-Appellee.

APPENDIX B — MEMORANDUM — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED AND FILED OCTOBER 10, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

00-CV-1230

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

vs.

GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, MAUREEN O. HELMER, in her official capacity as Chairman of the New York State Public Service Commission, THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD WEISS and NEAL N. GALVIN in their official capacities as Commissioners of the New York State Public Service Commission,

Defendants,

SHELDON SILVER, Speaker of the New York State Assembly, and RICHARD L. BRODSKY, Member of the New York State Assembly,

Intervenor-Defendants.

MEMORANDUM — DECISION AND ORDER

Appendix B

Presently before the Court is Plaintiff's motion for a preliminary and permanent injunction enjoining enforcement of Chapter 190 of the Laws of 2000.[1] For the reasons set forth below, Plaintiff's motion for a permanent injunction is GRANTED and its motion for a preliminary injunction is DENIED as moot.

I. Background

A. Indian Point Nuclear Power Plant

In 1972, Plaintiff purchased Model 44 steam generators from Westinghouse and installed them in its Indian Point 2 Nuclear Plant. In the mid to late 1970's, Westinghouse discovered that the metal alloy used to make the steam generator tubes in Model 44 and Model 51 steam generators was susceptible to corrosion. Approximately 30 nuclear

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1. In relevant part, the law states:

> By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care . . . Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility. . . . [T]he New York State public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility . . . [S]uch prohibition shall apply to the automatic adjustment mechanisms as well as base rates or any other recovery mechanism.

plants in the United States were using these two types of generators at the time of this discovery. By January 1, 1997, 13 plants had replaced the defective generators, 16 had not, and one plant had ceased operation. Plaintiff did not replace its generators because of its mistaken belief that they could safely remain in operation for many more years.

On February 15, 2000, one of the tubes located in the Model 44 generators in the Indian Point Plant suffered a 2-inch tear that allowed radioactive fluid to leak through a tube wall and mix with water and steam in one of the steam generators. The Indian Point Plant was shut down pending review of the incident by the Nuclear Regulatory Commission. In the interim, Plaintiff has decided to replace the existing model 44 generators with replacement generators purchased in 1988. Until these replacement generators are in place, Plaintiff will have to purchase power from other utilities to replace the power lost due to the Indian Point Plant's inability to operate. These replacement costs will cost Plaintiff between $165 million and $200 million.

B. New York Regulatory Framework

New York law allows the New York Public Service Commission ("PSC") to set energy rates that Plaintiff charges to its retail customers. These rates are set pursuant to the terms of a five-year Settlement Agreement approved by the PSC in 1997. Under the Agreement's terms, variations in costs Plaintiff incurs each month as it generates or purchases power can be passed onto its customers. The mechanism allowing this to occur is known as a Fuel Adjustment Clause ("FAC") (now called a Monthly Adjustment Charge).

Appendix B

PSC practice codified by state statute enables the PSC to retroactively adjust monthly utility rates charged to Plaintiff's customers (following a hearing) if the PSC determines that a utility like Plaintiff collected unreasonable charges under the FAC. When Plaintiff began reflecting the costs of Indian Point replacement power purchases in the FAC, the PSC commenced a proceeding to review the reasonableness of those charges. Had this proceeding determined that Plaintiff acted negligently in failing to replace the generators at Indian Point, the PSC would have ordered it to refund to its customers all costs associated with purchasing Indian Point replacement power.

C. The Indian Point Law

The New York State Assembly drafted Chapter 190 of the Laws of 2000 ("Indian Point Law" or "Chapter 190" or the "Bill") following the PSC's determination not to immediately suspend operation of Plaintiff's use of the FAC. The Law, approved by both the Assembly and the New York State Senate and signed by Governor Pataki, nullified the already commenced PSC review process by directly ordering it to prohibit Plaintiff from recovering from its ratepayers any costs associated with replacing power from the February 15, 2000 outage at the Indian Point Plant. The basis for this law is the legislative finding that "[b]y continuing to operate steam generators known to be defective . . . the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers."

Plaintiff has asked this Court for a preliminary and permanent injunction enjoining enforcement of the Indian

Point Law. Furthermore, Plaintiff has asked this Court to declare the Indian Point Law violative of (1) the Equal Protection Clause of the 14th Amendment; (2) the Procedural Due Process requirements of the 14th Amendment; (3) the Supremacy Clause; (4) the Contracts Clause contained in Article 1, § 10; and (5) the Prohibition on Bill of Attainder also contained in Article 1, § 10.

II. Equal Protection

A. Standard

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 15. The clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (citing *Plyer v. Doe,* 457 U.S. 202, 216 (1982)). Legislation that does not restrict a fundamental right or employ a suspect classification, like the social and economic legislation at issue in this case, is presumed valid as long as it is rationally related to a legitimate government interest. *See Cleburne Living Center,* 473 U.S. at 440; *Romer v. Evans,* 517 U.S. 620, 631 (1996).

This presumption of validity is buttressed by the notion that governments are entitled to wide deference when enacting social and economic legislation government. *See Cleburne Living Center,* 473 U.S. at 439. It is not the job of a federal court to ascertain the wisdom of a challenged statute or the utility of a questioned law. *See id.; Minnesota v. Clover Leaf*

Creamery Co., 449 U.S. 456, 469 (1981). This does not mean that this Court is stripped of its power to substantively review the legitimacy of social and economic legislation. *See, e.g., Dep't of Agriculture v. Moreno*, 413 U.S. 528, 532 (1973) (striking down a state statute which limited receipt of food stamps to households of related individuals while excluding households containing unrelated individuals as not rationally related to the stated purposes of the Food Stamp Act); *see generally Zobel v. Williams*, 457 U.S. 55 (1982).

Rather, this Court must ascertain whether any set of facts exist that may reasonably justify the challenged law. *See McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). If this Court determines that a reasonable justification for the law exists, it is required to uphold it. *See, e.g., Vacco v. Quill*, 521 U.S. 793, 807 (1997) (finding a reasonable justification to warrant classifying terminally ill patients who refuse medical treatment differently from patients who wish to engage in physician assisted suicide). Conversely, if this Court determines that the legislature acted arbitrarily or classified Plaintiff upon some ground not having a fair and substantial relation to the object of the act, such that similarly situated persons are treated differently, it must strike down the statute. *See Reed v. Reed*, 404 U.S. 71, 76 (1971); *see also, F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Defendants' lawyers contend that the legislature's determination to create a statute directed at Plaintiff is simply a response to its continued use of Westinghouse Model 44 steam generators. According to them, because Plaintiff is the only nuclear operator in New York using such generators,

it is impossible for any other utility to pass similar costs to its ratepayers. Therefore, the legislature rationally determined that Plaintiff is a legitimate class of one.

Although this Court recognizes that after-the-fact rationalizations of statutory classifications by lawyers and judges may serve to uphold the validity of a challenged statute, *see McDonald v. Board of Education,* 394 U.S. 802, 809 (1969), this rationalization makes little sense when examined in light of the express legislative findings accompanying the statute. According to these findings, "the Con-Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers." Therefore, the legislature concluded, "it would not be in the public interest for the company to recover from ratepayers any costs resulting from the" Indian Point outage.

Hence, the Indian Point Law was not passed simply as a response to Plaintiff's continued use of Model 44 generators. Instead, it was passed in response to Plaintiff's failure to exercise reasonable care on behalf of the health, safety, and economic interests of its customers. As such, this Court must determine 1) whether any legitimate state interest underlies this finding and 2) if the classification of Plaintiff is rationally related to any such legitimate state interest.

B. Legitimate State Interest

To determine the legitimacy of a state interest, this Court should begin its inquiry by examining the statute itself and its legislative history. *See Johnson v. Robinson,* 415 U.S. 361, 376 (1974). As long as the purposes of the statute can be

easily ascertained from these sources, this Court should limit its inquiry to them. *See id.* If these purposes do not offend specific constitutional prohibitions, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238 (1984) (quoting *Berman v. Parker,* 348 U.S. 26, 32 (1984)).

The stated purposes of the Indian Point Law are found in Section 1 of the statute and the accompanying memorandum in support of the law. According to Section 1 of the statute, it is not in the public interest for the company to recover from ratepayers any costs resulting from Plaintiff's failure to exercise reasonable care on behalf of its customers. The memorandum in support of the law declares that the purpose of the bill is to "protect ratepayers from costs related to imprudence by Con-Edison Company (Con-Edison) in relation to a recent radiation leak at the Indian Point 2 Nuclear Facility."

This Court does not dispute the legitimacy of the State's laudable desire to deter negligence at nuclear power plants, protect rate payers, and regulate utility rates. *See Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989). What this Court does view as problematic is the completely irrational manner in which the statute classifies Plaintiff in an effort to further these purposes.

C. Rational Relation of Legislature's Classification

A classification is rationally related to a legitimate government interest as long as it does not place persons into "different classes on the basis of criteria wholly unrelated to

the objective of the state." *Reed,* 404 U.S. at 76. As long as the classification is "reasonable, not arbitrary, and [rests] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike," this Court will uphold it. *Id.* (quoting *F.S. Royster Guano Co.,* 253 U.S. at 415.) However, as this Court has stated, if the classification is "so under-inclusive" that it bears no relation to the statute's purpose, the Court will strike it down. *Long Island Lighting Co. v. Cuomo,* 666 F.Supp. 370, 423 (N.D.N.Y. 1987).

In the instant case, the Court notes that the Indian Point Law singles out Plaintiff with unparalleled specificity and forbids it from recovering any costs associated from the Indian Point 2 shut-down. While it may be true that Plaintiff should not recover costs associated from the Indian Point 2 shut down, the Court fails to see how Plaintiff's allegedly negligent action here justifies the creation of a statutory class aimed directly at it. In particular, the Court sees absolutely no difference between the allegedly negligent conduct at issue in this case and any other case of nuclear power plant negligence normally brought before the PSC.

For example, had the New York State Electric and Gas Corporation engaged in negligent operation of its Nine Mile Point 2 nuclear power plant, it would have been entitled to pass replacement costs onto its customers until the PSC made a determination that the costs were incurred because of imprudence. Further, such a determination would be reviewable pursuant to Article 78 of the CPLR in the state courts. Yet, according to Defendants, Plaintiff was denied this same exact right because its negligence involved the use

of a specific model of generator. In essence, Defendants want this Court to accept the premise that because only Plaintiff could be negligent as to these specific model generators it did not have to draft a statute that applied to other similarly situated nuclear power plant operators.

This Court rejected this argument long ago. Writing in *Long Island Lighting Co.,* Chief Judge Munson stated:

> The fact that the terms of a statute, if drafted in such a way that it applied to all like-situated individuals, would in the legislature's estimation actually affect only one of those individuals does not justify drafting the statute in such a way that it applies only to that individual and not to the others who are similarly situated. This is akin to a small community, believing that one particular individual is prone to steal automobiles, passing an ordinance prohibiting that individual from stealing automobiles but not imposing a similar prohibition on all others in the community. Clearly, such an ordinance would offend the "element of neutrality that must always characterize the performance of the sovereign's duty to govern impartially."

Id. at 424 (citations omitted). Consequently, this Court concludes that the classification of Plaintiff based upon its use of Model 44 generator is arbitrary, does not rest upon some ground of difference fairly and substantially related to the object of the statute, and treats similarly situated nuclear power plant operators differently.

Moreover, this Court notes that there is some evidence to indicate that the articulated purpose underlying this arbitrary classification is a mere pretext for an impermissible purpose offending other constitutional provisions. In particular, this Court notes that the legislative record is replete with references that the Indian Point Law was passed to punish Plaintiff for its negligence and existing high rates.[2] If this legislative classification was upheld on the ground that punishing Plaintiff was rationally related to the statute's purposes, it would violate the most basic tenet of the Equal Protection Clause.

As the Supreme Court has emphatically stated, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *United States Department of Agriculture v. Moreno,* 413 U.S. at 534. New York State's legislature is not free to "pick and choose only a few to whom they will apply legislation and thus [ ] escape the political retribution that might be visited upon them if larger numbers were affected." Laurence Tribe, American Constitutional Law 998 (1978) (quoting *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 116 (1949)). For these reasons, the Indian Point Law violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

This Court has no doubt that if the New York State Legislature passes a law creating a higher standard of care

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2. The punitive purpose of Chapter 190 is discussed below in Part III. B.

for operators of nuclear plants in comparison to other types of energy plants that applies to all similarly situated nuclear plant operators, it would pass constitutional muster. Moreover, this Court has no doubt that if the PSC ultimately determines that Plaintiff acted negligently in failing to replace the generators at Indian Point 2 and orders Plaintiff to refund all replacement costs to its customers, that too would pass constitutional muster. Unfortunately, neither of these two avenues were taken, leaving this Court no choice but to strike down the Indian Point law as violative of the Equal Protection Clause.

III. Bill of Attainder

Plaintiff also argues that the Indian Point Law violates the Constitutional Prohibition against passing any bill of attainder. Article I, Section 10 of the Constitution provides that "[n]o State shall . . . pass any bill of attainder."[3] An unlawful bill of attainder is any law "that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977).

Historically, the bill of attainder was a parliamentary device used in sixteenth, seventeenth and eighteenth century England to sentence to death one or more specified persons for attempting or threatening to attempt to overthrow the government. *See United States v. Brown,* 381 U.S. 437, 441 (1965). However, the Supreme Court has held that:

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3. Article I, Section 9, applicable to Congress, states that "[n]o Bill of Attainder or ex post facto Law shall be passed." Section 10 applies the same rule to the States.

> the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.

United States v. Brown, 381 U.S. at 442. The *Brown* Court went on to hold that "[t]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."[4] *Brown,* 381 U.S. at 445; *see also McMullen v. United States,* 989 F.2d 603, 607 (2d Cir. 1993).

The Court's opinion and the Clause's important purpose are borne out in the writings of the Framers themselves. James Madison wrote:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary,

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4. Although the Supreme Court has not explicitly held so, it has stated in dicta that the Bill of Attainder Clause applies to corporate entities as well as to individuals. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 239 n.9 (1995). It is this Court's opinion that such an interpretation, although not explicitly adopted by the Supreme Court, is correct given the broad intent of the Clause and it is, accordingly, adopted.

> self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist, No. 47, at 373-74 (Hamilton ed. 1880). The *Brown* court also cited the writings of Madison and Alexander Hamilton in finding that:

> [t]he authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, in a representative republic where the legislative power is exercised by an assembly which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments.

Brown, 381 U.S. at 443-44 (quotations omitted) (citing generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton) and 78 (Hamilton)). Madison also stated that "[b]ills of attainder . . . are contrary to the first principles of the social compact and to every principle of sound legislation," The Federalist, No. 44, at 282, and, quoting Montesquieu, wrote that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislature," The Federalist, No. 47, at 303.

Additionally, the *Brown* Court observed that a legislative body, which is by its very nature dependent upon the people, is rendered "liable to be peculiarly susceptible to popular clamor" and is "not properly constituted" to take such actions. *Brown,* 381 U.S. at 445 (quoting 1 Cooley, Constitutional Limitations, pp. 536-37 (8th ed. 1927)). With this fear in mind, the Court held, the Framers banned bills of attainder in order to limit legislatures "to the task of rulemaking." *Id.* at 446. Hence, the Supreme Court has always recognized the Bill of Attainder Clause as an important piece of the constitutional framework ensuring the separation of powers, one of our nation's most deeply imbedded principles. *See, e.g., Fletcher v. Peck,* 10 U.S. 87, 138 (1810) (Chief Marshall holding that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); *Plaut,* 514 U.S. at 242 (noting that "the Constitution's 'separation-of-powers' principles reflect, in part, the Framers' concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person" and that this principle was expressed "both in specific provisions, such as the Bill of Attainder Clause, and in the Constitution's general allocation of power") (citations omitted). It is with these principles in mind that the Court will apply the Bill of Attainder Clause to the facts of this case.

A. Standard

It is well established that, in order to determine whether a legislative enactment is an unlawful bill of attainder, the Court must determine whether the challenged law inflicts

punishment on specifically designated individuals or entities without the benefit of judicial trial. *See Brown,* 381 U.S. at 448-49 (citing *United States v. Lovett,* 328 U.S. 303, 315-16 (1946)). In other words, a law is a bill of attainder if it satisfies "a three-pronged conjunctive test that considers whether the act: (1) imposed punishment, (2) specified the persons, and (3) lacked the protection of judicial process." *McMullen,* 989 F.2d at 611 (citing *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 847 (1984)).

Chapter 190 clearly satisfies the second and third prongs of this test. The specificity prong is satisfied if "the challenged act singles out a person or identifiable group either by name or by describing those affected by the act 'in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.' " *Long Island Lighting Co.,* 666 F.Supp. at 403 (quoting *Communist Party of United States v. Subversive Activities Control Bd.,* 367 U.S. 1, 86 (1961)). Chapter 190 takes the extraordinary step of naming Plaintiff as the solitary target of the legislation. Consequently, there is no doubt that the Indian Point Law satisfies the specificity prong of the bill of attainder test.

Likewise, it is clear that Plaintiff was not accorded judicial process in this case. Quite the contrary, Chapter 190 was passed following the ordinary legislative process. Plaintiff was given no judicial or quasi-judicial protections to fight the legislature's determination that it "failed to exercise due care" in failing to replace the generators at Indian Point 2.

B. Punishment

The harder question for the Court is whether the Indian Point Law inflicts "punishment." This is a fact-specific inquiry, *McMullen,* 989 F.2d at 612, and each case must turn " 'on its own highly particularized context,' " *Selective Service,* 468 U.S. at 852 (quoting *Flemming v. Nestor,* 363 U.S. 603, 616 (1960)). The Supreme Court has developed a series of tests to be used in determining whether the legislative enactment in question inflicts "punishment." Courts must consider: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.' " *Selective Service,* 468 U.S. at 852 (quoting *Nixon,* 433 U.S. at 475-76); *see McMullen,* 989 F.2d at 612. These tests are referred to as the "historical," "functional" and "motivational" tests, respectively. *See id.* Although it need not do so in order to be found violative of the Bill of Attainder Clause, Chapter 190 satisfies all three of these tests.

1. *Historical Test*

The "historical" test asks whether the enactment imposes a punishment "traditionally judged to be prohibited by the Bill of Attainder Clause." *Nixon,* 433 U.S. at 475. Among those forms of punishment traditionally prohibited are imprisonment, banishment, execution, punitive confiscation of property and bars against participation in specified employments or vocations. *See id.*

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In *Long Island Lighting Co.,* this Court observed that the Bill of Attainder Clause:

> has been applied only to legislation closely paralleling the historical characteristics of common law bills of attainder and bills of pains and penalties, the most important of which is a design "to inflict[ ] its deprivation upon the members of a political group thought to present a threat to national security."

Long Island Lighting Co., 666 F.Supp. at 403 (quoting *Brown,* 381 U.S. at 453). In that case, the plaintiff, in circumstances similar to those found here, claimed that acts passed by the New York State Legislature "imposed economic disabilities and deprivations" on it, constituting "punitive confiscation" of its property interests. *Id.* at 404. The Court rejected the plaintiff's arguments because the acts provided for just compensation for any property lost and, "most importantly", because the challenged acts were "not '[g]enerally addressed to persons considered disloyal to the Crown or State.' " *Id.* (quoting *Brown,* 381 U.S. at 474).

In this case, defendant PSC has estimated the total costs of the sanction imposed on Plaintiff at $162 million through August 31, 2000. As new steam generators will not be installed for at least a few more months, this number could eventually be much larger. Plaintiff is not offered any compensation under the terms of Chapter 190. Moreover, as discussed below, the Court finds that these sanctions were imposed for punitive purposes by the legislature. Accordingly, Chapter 190 certainly imposes "punitive confiscation of property" on Plaintiff.

Plaintiff, of course, cannot argue that it is a "political group thought to present a threat to national security." *Brown,* 381 U.S. at 453. However, to suggest that, in order to fall within the traditional prohibitions of the Bill of Attainder Clause, an act must punish only members of such a class is far too cramped a reading of the standards established by the Supreme Court. Indeed, it has been noted that "[t]he concept of punishment under the bill of attainder clause has always been a fairly broad one." Laurence Tribe, American Constitutional Law § 10-4, at 642 n.9 (2d ed. 1988).

As discussed above, it is well established that the Bill of Attainder Clause is not to be construed narrowly, but rather as an important tool in assuring the separation of powers. *See Brown,* 381 U.S. at 442. The Framers were concerned with occasions on which the legislature could take advantage of the existing political landscape to usurp the functions of its fellow branches, not just those in which the subject of the legislation is considered a threat to the State. Considering this goal, the Clause's historical scope properly includes actions against any person or persons who are so unpopular politically that the legislature may take unilateral action against them without fear of political retribution. This is not to say that any legislation imposing limitations or restrictions on individuals or entities is suspect. Such a construction of the Bill of Attainder Clause would paralyze legislative activity. Instead, the confiscation in question must be punitive in nature, as is the case here.

Plaintiff, a powerful utility, although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular.

This is particularly so when it is accused of exposing the public to the risk of nuclear leaks and of unjustly passing along millions of dollars in resultant costs to the rate payers. Indeed, this was not lost on the legislature, as one Senator proclaimed during debate of the bill that it made for "great politics" but "horrible policy." Accordingly, it fits nicely into the class of persons traditionally protected from bills of attainder.

2. *Functional Test*

Even if Chapter 190 does not satisfy the "historical" test, the Supreme Court has " 'emphatically rejected the argument that the [Bill of Attainder Clause] outlawed only a certain class of legislatively imposed penalties.' " *McMullen,* 989 F.2d at 607 (quoting *Brown,* 381 U.S. at 447-48). In *Nixon,* the Court held that it had not "precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Nixon,* 433 U.S. at 475. Accordingly, the Court "often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Id.* at 475-76. Upon review of the stated purpose of Chapter 190, the sanctions it actually imposes, and the circumstances surrounding its enactment, the Court finds that it cannot reasonably be said to further nonpunitive goals. To the contrary, it is apparent that the purpose of Chapter 190 is to punish Plaintiff for its actions.

Appendix B

As discussed above, the statute's stated purpose is to "protect ratepayers from costs related to imprudence by" Plaintiff in relation to the leak at Indian Point. Although, on its face, such a purpose does not appear punitive, a number of important factors indicate that the legislature was indeed intent on punishing Plaintiff for its prior actions.

First and foremost, this Court's conclusion that the legislature's "class of one" is not rationally related to the stated purpose of the bill makes it suspect under the Bill of Attainder Clause. Although not determinative of the issue, the legislature's explicit naming of one entity to suffer the sanctions Chapter 190 inflicts, when that classification is not rational, bespeaks an intent to punish the named entity. As Justice Kennedy stated in his *Nixon* concurrence, "the very specificity of the statute would mark it is punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires [legislatures] to proceed by general rulemaking rather than deciding individual cases." *Nixon,* 433 U.S. at 485-86.

In *Nixon,* the Supreme Court held that "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature . . . could have achieved its legitimate nonpunitive objectives." *Id.* at 482. In this case, the legislature had a readily available alternative that would have achieved the same goal in a considerably less burdensome fashion. The existing regulatory framework would have prevented Plaintiff from passing costs resulting from "imprudent" actions onto its customers. Indeed, the PSC had already begun proceedings to review the prudency of the charges surrounding the leak at Indian Point.

Again, this reality was not lost on the legislature. One senator argued during debate of the bill that the legislature was making its determination without following "old fact gathering procedures [it] generally" uses and that it was performing those functions which it had "hired judges to do." Moreover, the Chairman of the PSC, defendant Maureen Helmer, wrote to the sponsors of the bill making clear that the PSC was in the process of performing a prudency review. The letter also warned the legislators of the constitutional infirmity of the proposed bill. In spite of this, the legislature took upon itself the role of adjudicator and eschewed the less burdensome alternative of a quasi-judicial determination by the PSC followed by review in the courts.

The language used by senators in debating Chapter 190 also strongly suggests a punitive intent in its passage. It is clear from the record that the legislature made particularized findings of fact that Plaintiff engaged in blameworthy actions in the past and proceeded to institute appropriate sanctions. The sponsors and other legislators used language such as "punish" and "penalize" and "has done a terrible thing here."[5]

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5. For example, during Senate debates on Chapter 190 Senator Velella declared:

> Con Edison has done a terrible thing here. They have negligently performed their function as a utility company. They failed to install a generator that was given to them, to replace a defective one. And they put lives at risk. Now, nobody wants to come in and swear to the fact, yes we did that. I doubt very seriously if anybody from Con Ed ever will swear to the fact that they did it. But they did it. And Velella's law is going to stop them and punish them.

Further, the Supreme Court has found that "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive." *Brown,* 381 U.S. at 458. Here, Chapter 190 itself provides that its effect will be to "discourage [nuclear operators from] risking public health and safety." That the legislature took this action against a single entity to deter future similar action is unmistakable evidence of punitive intent. As discussed this legislative intent is commendable. A general rule effecting such an intent by proscribing greater penalties for such actions, as are alleged here, would almost certainly pass constitutional muster. However, the legislature did not do this. Instead it levied punishment against a single entity and in the process subsumed the powers of all three branches of government.

Finally, it is critical to note that counsel for defendant PSC acknowledged at oral argument that, had Plaintiff replaced the Westinghouse generators in 1988, the costs would probably have been passed onto the ratepayers with no interference from the PSC. Many of the same costs resulting from the recent leak would have been incurred if the generator had been replaced in 1988. Moreover, purchased power costs during planned refueling and maintenance outages, even when they coincide with imprudently caused outages, are recoverable by the utility. That Plaintiff is not allowed to recover these costs by Chapter 190, makes it clear that the legislature is acting to punish Plaintiff for what was deemed to be its blameworthy conduct in continuing to operate with the Westinghouse generators.

Appendix B

3. *Motivational Test*

Finally, under the "motivational" test, the Court must ascertain "whether the legislative record evinces a congressional intent to punish." *Nixon,* 433 U.S. at 478. As discussed above, the legislative record and all of the circumstances surrounding Chapter 190's enactment make it clear that the New York State Legislature was acting with the intent of punishing Con Edison.

In the final analysis, it is apparent to the Court that Chapter 190 constitutes exactly the kind of legislative action that the Bill of Attainder Clause was drafted to prevent. Having determined that a politically unpopular entity may have acted wrongfully, rather than setting "forth a generally applicable rule . . . and leave to the courts and juries the job of deciding what [entities] have committed the specified acts or possess the specified characteristics," the legislature took it upon itself to determine the entity's guilt and to impose the sanction it deemed appropriate. *Brown,* 381 U.S. 437. In short, the legislature "was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses." *Nixon,* 433 U.S. at 479. Consequently, the Court finds that the Indian Point Law violates the constitutional prohibition against enacting a bill of attainder.[6] As the Court has determined that it is violative of the Equal Protection

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6. Because this Court determined that the Indian Point Law is unconstitutional on equal protection and bill of attainder grounds, it will not address Plaintiff's other constitutional claims. Furthermore, because the Court has granted a permanent injunction, Plaintiff's motion for a preliminary injunction is denied as moot.

Clause and the Bill of Attainder Clause, Defendants are enjoined from taking any action to implement or enforce Chapter 190.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff's motion for a permanent injunction is GRANTED; it is further

ORDERED that Defendants are enjoined from taking any action to implement or enforce Chapter 190 of the Laws of 2000; it is further

ORDERED that Plaintiff's motion for a preliminary injunction is DENIED as moot; and it is further

ORDERED that the Clerk shall serve copies of this Order by United States Mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED.

s/ Hon. Lawrence E. Kahn
Hon. Lawrence E. Kahn
United States District Judge

Dated: October 10, 2000
Albany, New York

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED JULY 2, 2002

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DOCKET NO. 1:00-CV-1230 (LEK/RWS)

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

v.

GEORGE E. PATAKI, in his official capacity as Governor of the State of New York; MAUREEN O. HELMER, in her official capacity as Chairman of the New York State Public Service Commission; and THOMAS J. DUNLEAVY, JAMES D. BENNETT, LEONARD WEISS and NEAL N. GALVIN in their official capacity as Commissioners of the New York Public Service Commission,

Defendants,

SHELDON SILVER, Speaker of the New York State Assembly, and RICHARD L. BRODSKY, MEMBER OF THE New York State Assembly,

Intervenor-Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

Appendix C

_____ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ DECISION by COURT. This action came to trial or hearing before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in the above entitled action, JUDGEMENT is GRANTED in favor of the Plaintiff; and it is FURTHER ORDERED, that the plaintiff's motion for a permanent injunction is GRANTED, that the plaintiff's motion for preliminary injunction is DENIED as moot and that costs are awarded to the plaintiff-appellee in accordance with the ORDER of the Honorable Lawrence E. Kahn, United States District Judge, dated July 18, 2001, the STIPULATION and ORDER to withdraw the remaining Third Party action filed on August 30, 2001 and the Second Circuit Court of Appeals Mandate dated 6/5/02.

DATE: July 2, 2002

LAWRENCE K. BAERMAN
CLERK OF THE COURT

By: s/ Scott A. Snyder
DEPUTY CLERK, Scott A. Snyder

Nos. 02-358 and 02-475

Supreme Court, U.S.
FILED
OCT 23 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE E. PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

RICHARD L. BRODSKY, New York State Assembly Member,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Counter-Statement of Questions Presented

1. Does the Bill of Attainder Clause apply to corporations, as every court that has considered the issue has held or assumed?

2. Did the courts below correctly find that the Indian Point Law (Chapter 190 of the New York Laws of 2000) imposed punishment, where (among other things) the deprivation mandated by the law was more than double the total amount of additional costs caused by the alleged imprudence, and the Senate sponsor of the law proclaimed that "[my] Law is going to stop them and punish them"?

3. Independently of the Bill of Attainder Clause, was the Indian Point Law also invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that was preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause?

Statement Pursuant to Supreme Court Rule 29.6

Respondent Consolidated Edison Company of New York, Inc. is a wholly-owned subsidiary of Consolidated Edison, Inc., a publicly held company. There is no other publicly held company that owns 10% or more of respondent's stock.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GEORGE E. PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

RICHARD L. BRODSKY, New York State Assembly Member,

Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Before the Court are two petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit, filed by Governor George E. Pataki, *et al.* ("Pataki Pet.") and New York State Assembly Member Richard L. Brodsky ("Brodsky Pet."). The petitions should be denied. Contrary to petitioners' arguments, the decision below is not in conflict with any decision of this or any other court. Rather, the court of appeals carefully applied the standards articulated by this Court under the Bill of Attainder Clause to the facts in the record, most of which are omitted from the petitions.

Counter-Statement of the Case

A. The Rates Set by the New York State Public Service Commission ("PSC") Which Authorized Con Edison to Recover Replacement Power Costs Unless the PSC Found Imprudence After a Hearing

The New York State Public Service Commission ("PSC") regulates intrastate electric utility service in New York pursuant to the New York State Public Service Law. *See* N.Y. Public Service Law §§ 64-77. The Public Service Law is a comprehensive regulatory scheme which "encompasses virtually all aspects of the [utility] business." *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154, 1160 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985). The New York courts have repeatedly emphasized the breadth of the Legislature's delegation of power to the PSC. *See, e.g., Niagara Mohawk Power Corp. v. PSC*, 69 N.Y.2d 365, 369, 507 N.E.2d 287, 289, 514 N.Y.S.2d 694, 696 (1987).[1]

In setting rates, the PSC has the power to disallow recovery

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[1] The enactment of the Public Service Law followed the New York State Legislature's recognition that it was impracticable for it to set rates individually for all of the various localities and types of utilities in the state. *See Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 143-44, 83 N.E. 693, 699 (1908).

of utility expenditures caused by imprudence, but this power is subject to both substantive and procedural safeguards. As a substantive matter, a finding of imprudence cannot be based on 20/20 hindsight, but can only be made if the utility acted unreasonably based on the circumstances as they existed at the time it acted. *Long Island Lighting Co. v. PSC*, 134 A.D.2d 135, 143-44, 523 N.Y.S.2d 615, 620 (3d Dep't 1987). Procedurally, it is necessary "to demonstrate a tenable basis for raising the specter of imprudence before the utility can be called upon to defend its conduct," *id.* at 144, 523 N.Y.S.2d at 620, and the utility has a right to an evidentiary hearing on the issue of imprudence, followed by a reasoned determination by the PSC which is subject to judicial review under Article 78 of New York's Civil Practice Law and Rules ("CPLR"). *See, e.g.*, N.Y. Public Service Law § 72. As the PSC acknowledged in this case (A1379),[2] the issue of imprudence is an adjudicatory issue, akin to the issue of fault in an ordinary civil case. *See, e.g., Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876, 885-86 (2d Cir. 1993).

Fuel adjustment clauses ("FACs") are used to adjust rates automatically for changes in the costs of fuel and purchased power and other expenses whose level is subject to fluctuation (A128-A129). The PSC has approved the use of FACs in utility tariffs since 1917. *Niagara Mohawk Power Corp. v. PSC, supra*, 69 N.Y.2d at 370, 507 N.E.2d at 290, 514 N.Y.S.2d at 697. A 1981 statute confirmed the PSC's power to review for imprudence the charges that had been passed on pursuant to FACs. L. 1981, c. 304, adding N.Y. Public Service Law § 66(12)(k). This statute recognized and "in no way change[d] the important safeguards of due process for the utilities already set forth in the Public Service Law." Memorandum for the Governor From Attorney General Robert Abrams, June 23, 1981, at 3, in

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[2] "A" citations are to the joint appendix in the court of appeals.

Governor's Bill Jacket for L. 1981, c. 304.

In a number of proceedings over the years, the PSC has considered the prudence of replacement power costs associated with nuclear plant outages. These proceedings have established several important principles. First, the standard of imprudence in cases dealing with nuclear plant outages is the same standard that applies in imprudence proceedings generally – reasonableness under the circumstances as they existed at the time the utility acted. *See, e.g., Niagara Mohawk Power Corp.*, 24 N.Y.P.S.C. 6205, 6211 & n.1, 6226 (1984); *Consolidated Edison Co.*, 22 N.Y.P.S.C. 98, 105-08 (1982). Second, even where imprudence is found, no disallowance will be made for those portions of outages that would have been necessary in any event for maintenance, refueling, or installation of new equipment. *See, e.g., Niagara Mohawk Power Corp.*, 31 N.Y.P.S.C. 1745, 1765-68 (1991); *Consolidated Edison Co.*, 34 N.Y.P.S.C. 663, 678 (1994). Finally, the PSC's consideration of this issue has included all of the procedural safeguards which apply in imprudence proceedings generally. *See, e.g., Niagara Mohawk Power Corp., supra*, 24 N.Y.P.S.C. at 6209.

During the relevant period, the electric rates of respondent Consolidated Edison Company of New York, Inc. ("Con Edison") were fixed by an agreement entered into by Con Edison, the PSC staff, the New York State Department of Law, and many other parties (A427-A546), which was approved by the PSC in 1997 (A417-A425, A553-A669). This agreement provided for rate reductions of more than $1.1 billion (A441-A443), as well as the divestiture of Con Edison's fossil fuel generating plants (A477-A479). As part of the overall agreement between the parties, the agreement provided that Con Edison would recover through the FAC the cost of purchasing energy in the volatile and now unregulated wholesale market (A158-A166, A467-A468, A1359). The FAC expressly provided that cost increases or savings relating to the operation of

Con Edison's Indian Point 2 nuclear plant would be charged or credited to customers through the FAC, except that Con Edison would retain or bear 30% of such cost changes up to a maximum of $10 million per year (A130-A131, A163).[3]

B. The Indian Point 2 Nuclear Plant and the February 2000 Outage

Beginning in 1974, Con Edison operated the Indian Point 2 nuclear power plant ("Indian Point 2") in Westchester County, New York (A30). Indian Point 2 is a pressurized water reactor plant, in which hot, pressurized, radioactive primary water from the nuclear reactor vessel is pumped through tubes in four steam generators, where it is used to vaporize nonradioactive secondary water into steam which is used to generate electricity (A40-A41, A267-A268).

Westinghouse manufactured two models of steam generators (Models 44 and 51) that had tubes made of the same metal alloy, Inconel 600 (A41, A726-A727). Westinghouse delivered these models to approximately 30 nuclear plants in the United States (A42). In the 1970s, it was discovered that Inconel 600 was susceptible to corrosion in certain environments (A41, A727). As a result, Con Edison and many other utilities sued Westinghouse. *See, e.g., Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 567 F. Supp. 358, 360 (S.D.N.Y. 1983).

Because petitioner Brodsky wrongly claims that it is "undisputed" that Con Edison was negligent in not replacing the steam generators sooner than it did (Brodsky Pet. 27), it is important to note that Con Edison carefully considered whether this would be in the best interests of its customers. Premature installation would have cost customers over $100 million in

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[3] The Brodsky petition asserts that Con Edison was the only New York utility with a fuel adjustment clause covering nuclear plant outages (Brodsky Pet. 3), but this is inaccurate (A673, A1359).

construction costs, plus the cost of purchasing replacement power during the installation (A43). Con Edison, like many other nuclear plant operators, was successful in combating corrosion in the steam generators by making changes in water chemistry and other aspects of plant operation (A42).[4] Indeed, Con Edison's success in stopping the corrosion was used against it by Westinghouse in defending against Con Edison's warranty claim. *See Consolidated Edison Co. v. Westinghouse Elec. Corp.*, 594 F. Supp. 698, 699 (S.D.N.Y. 1984) ("[t]he corrosion of the steam generators at Indian Point Unit 2 is essentially arrested" and "if the current condition of the steam generator continues, the steam generator should serve the life of the plant").

Con Edison's operation of the Indian Point 2 plant, including its steam generators, was subject to extensive regulation by the Nuclear Regulatory Commission ("NRC") (*see* A46-A54). As required by the NRC, the steam generator tubes were inspected by highly trained specialists every two years, and the inspections were reported in detail to the NRC (*see* A43-A44, A1229-A1282).

On February 15, 2000, one of the 13,000 steam generator tubes at Indian Point 2 experienced a two-inch crack, allowing a small quantity of radioactive primary water to leak through the tube wall (A40, A44, A56). The leak was immediately detected, and the plant was manually shut down by the operators (A44, A56-A58). It is undisputed that the incident did not affect the health or safety of any member of the public (A59-

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[4] As of January 1997, approximately 16 of the 30 plants built with Westinghouse Model 44 and 51 steam generators in the United States were still using their original steam generators (A42). Petitioners' statement that Con Edison was the only utility that did not replace the Model 44 steam generators (Pataki Pet. 3; Brodsky Pet. 2) is misleading because it ignores the 15 plants still using Model 51 steam generators, which used the identical Inconel 600 alloy (*see* A1359).

A61, A72). Indeed, the releases represented a small fraction of the normal amount of background radiation (A59-A60).

Shortly after the incident, Con Edison found the leak and plugged the affected tube (A44). During the period from February through June 2000 (a substantial portion of which coincided with a pre-planned refueling and maintenance outage), Con Edison inspected all of the steam generator tubes at Indian Point 2, and reported its findings to the NRC (A44-A45, A1360; A1375). In August 2000, Con Edison decided to install new steam generators before restarting the plant (A37). Following installation of the new steam generators, the plant resumed operations in January 2001.

Because the cost of generating electricity at the Indian Point 2 plant was substantially less than the price of replacement power,[5] the unavailability of the plant during the outage resulted in increased energy costs of about $250 million. It is undisputed in the record that more than half of this amount was attributable to the time required for refueling, maintenance, and installation of the new steam generators, all of which would have been required even if the new steam generators had been installed earlier, as the petitioners argue they should have been (A1360, A1375). Under the legal standards applied by the PSC, the time required for these purposes would not be included in any disallowance (*see* p. 4 *supra*).

C. The PSC's Investigation of the Outage and Its Holding That There Was as Yet No Record Basis for a Finding of Imprudence

Immediately after the February 15, 2000 outage, the PSC staff began to investigate the outage (A55-A69, A213). On

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[5] It is estimated that Con Edison's operation of the Indian Point 2 plant saved customers more than $3 billion in electricity costs since it commenced service in 1974 (A124-A125, A223).

March 30, 2000, the PSC commenced a formal proceeding to investigate the prudence of the outage (A71-A76). The PSC emphasized that the standard of prudence to be applied in the proceeding would be the standard that it had previously applied in such cases, namely, "how reasonable people would have performed the tasks that confronted the company" (A75).

Westchester County petitioned the PSC to suspend the operation of Con Edison's FAC, arguing that Con Edison was imprudent because it was the only utility that had not replaced its Westinghouse Model 44 steam generators (A347-A353) – exactly the argument accepted by the Legislature in the Indian Point Law. The PSC rejected the Westchester County petition (A167-A173). The PSC held that "there is, as yet, no record basis on which one could conclude that there is a substantial likelihood that Con Edison acted imprudently" (A172). The PSC emphasized that Westchester County's argument failed to take account of the established legal standard of imprudence:

> "The unanswered allegations in the Westchester Petition do not address the circumstances existing at the time the decisions were made, nor do they measure those decisions against the 'reasonableness' standard." (*Id.*)[6]

D. The Assembly's Condemnation of Con Edison and Its Passage of the Indian Point Law

On March 3, 2000, three committees of the New York State Assembly held a joint hearing, which was chaired by petitioner Brodsky (A783-A979). Although the Brodsky petition implies that this hearing gave the Legislature a factual basis for the

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[6] Petitioners incorrectly state that the PSC proceeding has been informally stayed during the pendency of this case (Pataki Pet. 5 n.2). In fact, the parties are involved in extensive discovery proceedings, and the filing of testimony is scheduled for February 14, 2003.

Indian Point Law (Brodsky Pet. 3-4), the notice of the hearing did not include any issue relating to imprudence (*see* A215-A217), and at the hearing petitioner Brodsky referred to the subject of imprudence only as an "assumption" that he had "no reason" to think was true:

> "Assume for a second – and I'm putting it out as an assumption – I have no reason to think it's true – but assume that Con Ed itself would have acted negligently in some way with respect to the cause or control of the incident, would that change your legal ability to collect from ratepayers the fuel adjustment charge?" (A919-A920.)

Although petitioner Brodsky had no reason to think Con Edison was imprudent on March 3, 2000, he had changed his mind by March 20, 2000, when he co-sponsored a bill, together with 56 other Assembly members, which declared that "the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers" (A77). The accompanying sponsors' memorandum explained that this finding of imprudence was based on Con Edison's failure to replace its Model 44 steam generators when other nuclear plant operators had replaced theirs (A79) – the exact same rationale which the PSC rejected as incompatible with the established legal standard of imprudence (*see* p. 8 *supra*).

On March 27, 2000, only one week after the bill was introduced, it passed the New York State Assembly by a lopsided vote of 137 to 10 (A1045). Assembly members voting for the bill condemned Con Edison's conduct (*e.g.*, "ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind" (A89)); stressed safety issues that are within the exclusive jurisdiction of the NRC under the Atomic Energy Act (*e.g.*, "the implications when a plant is not

running safely has great implications for the rest of the State" (A88)); and expressed a lack of confidence in the PSC and the NRC (*e.g.*, "And I would just like to say that the systems that we have in place, be they the PSC, the NRC, ConEdison, they really have not been working for us" (*id.*)).

E. The PSC's Warning That There Was No Factual Basis for the Indian Point Law and That It Was Probably Unconstitutional

At this point, the PSC issued an extraordinary and unprecedented warning to the Legislature about the bill which had already passed the Assembly.

In a letter to members of the Legislature (A81-A82), the PSC stated that there was no factual basis for the bill's finding of imprudence on the part of Con Edison:

> "A. 10096, a bill introduced by Speaker Silver and passed by the Assembly, would prohibit Consolidated Edison from recovering any costs of replacement power. This prohibition is based on a proposed legislative finding that failure to replace IP 2 generators caused increased risk of radioactive leakage or plant outages. Until the investigations and proceedings are completed, there is no basis for such a finding. We, therefore, request that the Assembly recall the bill from the Senate and reconsider its passage pending the Commission's prudence investigation." (A81.)

The PSC further explained that the bill was not needed to fulfill its stated purpose, because the PSC already had the power to disallow imprudent fuel adjustment expenses (A81). Finally, the PSC issued a thinly veiled warning that the bill was probably unconstitutional because of the manner in which it targeted a single incident involving Con Edison (A82).

F. The Senate's Passage of the Indian Point Law and the Senate Sponsor's Avowal of His Intent to Punish Con Edison

The PSC's warning did not deter the New York State Senate from approving the bill by a margin even more lopsided than the Assembly's. On May 24, 2000, the Senate voted 57 to 1 in favor of the bill (A1045-A1046).

Members of the Senate who voted for the bill roundly condemned Con Edison's conduct (*e.g.*, "they choose to do it any way they want" (A96)), and declared that Con Edison should be punished (*e.g.*, "they should certainly be penalized for taking our health and toying with it" (A109)).[7] Especially telling were the statements of the Senate sponsor of the bill, Senator Velella. Senator Velella declared that "Con Edison has done a terrible thing here" and that "they put lives at risk" (A103). What is more, he proclaimed that "Velella's Law is going to stop them and punish them" (A104). It would be hard to imagine a more forthright or emphatic declaration of condemnation and punitive intent.

Governor Pataki approved the bill on August 8, 2000 (A414-A415). In approving the bill, the Governor made clear that he would not normally approve "legislation that usurps the PSC's authority in this area," but he said that he would do so in this "exceptional case" (A415).

On August 9, 2000, the day after the Governor's approval of the Indian Point Law, the PSC issued an order implementing the law (A116-A122). The PSC held that, because the law mandated the disallowance of *all* Indian Point replacement power charges, it could not reduce the disallowance to take

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[7] In fact, both the state and the NRC investigations concluded that there was no offsite release of radioactivity and no risk to the public health (Pataki Pet. 3a).

account of refueling or repair outages (A120), as it normally does (*see* p. 4 *supra*). This alone more than doubled the magnitude of the deprivation (*see* p. 7 *supra*).

G. The Critical Differences Between the Indian Point Law and the Substantive and Procedural Standards of Imprudence Applied in All Other Cases

There are crucial differences between the Indian Point Law and the substantive and procedural standards applied by the PSC in other cases.

Among the substantive differences between the Indian Point Law and the legal standards applicable in all other cases are the following:

- The legal standard of prudence applied by the PSC is a standard of reasonableness based upon the circumstances as they existed at the time the utility acted (*see* pp. 3, 4 *supra*). The Indian Point Law did not apply this standard, but instead was based upon *post hoc* reasoning of a kind which the PSC held did not even establish a substantial likelihood of imprudence in this case (*see* pp. 8, 9 *supra*).

- The PSC has held that no disallowance will be made for outages that would have been necessary in any event for refueling, maintenance, and installation of new equipment (*see* p. 4 *supra*). The Indian Point Law mandated the inclusion of such outages in the disallowance (*see* pp. 11-12 *supra*). As noted above, this alone more than doubled the magnitude of the deprivation (*see* pp. 7, 12 *supra*).

The procedural differences between the Indian Point Law and the legal standards governing the PSC in other cases are equally striking. Among the procedural rights which were denied here are the following:

- The right to notice of the asserted grounds for a finding of

imprudence (*see* pp. 3, 9 *supra*);

- The right to an evidentiary hearing at which the utility is able to present and cross-examine evidence on all issues of imprudence (*see* pp. 3, 9 *supra*); and
- The right to a reasoned decision by the PSC and to judicial review of any disallowance pursuant to Article 78 of the CPLR (*see* pp. 3, 11-12 *supra*).

REASONS FOR DENYING THE WRIT

I. This Case Presents No Issue Calling for Review by This Court

A. There Is No Conflict Among Courts Concerning the Applicability of the Bill of Attainder Clause to Corporations

Petitioners argue that this Court should grant certiorari to settle the issue of the applicability of the Bill of Attainder Clause to corporations (Pataki Pet. 8-17; Brodsky Pet. 19-29). But there is no conflict on this issue for this Court to resolve.

Every court that has considered the issue has held or assumed that the Bill of Attainder Clause applies to corporations – an assumption which has typically been shared by all of the parties before them, despite the fact that they disagreed sharply on the other issues raised.[8] No court has ever suggested that the Bill

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[8] *See, e.g., Club Misty, Inc. v. Laski*, 208 F.3d 615, 617 (7th Cir.) (assuming, without deciding, that corporations as well as individuals are protected by the Bill of Attainder Clause), *cert. denied*, 531 U.S. 1011 (2000); *Navegar, Inc. v. United States*, 192 F.3d 1050, 1065 (D.C. Cir. 1999) (stating that a bill of attainder is a law that "specifically singles out individuals (or businesses) and imposes punishment on them"), *cert. denied*, 531 U.S. 816 (2000); *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (parties assumed "that the Bill of Attainder Clause protects corporations as well as individuals"); *SBC Communications, Inc. v. FCC*, 154 F.3d

of Attainder Clause does not apply to corporations.

In light of this broad consensus on the issue, there is simply no conflict calling for resolution by this Court.[9] It will be time enough for this Court to intervene if any court should ever hold that the Bill of Attainder Clause does not apply to corporations.

As the court of appeals noted (Pataki Pet. 12a), this Court has twice indicated that the Bill of Attainder Clause protects corporations and other entities as well as individuals. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid – or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause . . . ."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (Bill of Attainder Clause protects "individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt").

As this Court explained in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978), the only constitutional provisions that do not extend to corporations are those "'purely personal' guarantees" whose "'historic function' has been limited to the protection of individuals," such as the privilege against self-incrimination. The Bill of Attainder Clause is not

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226, 234 & n.11 (5th Cir. 1998) (assuming "that the Bill of Attainder Clause applies to corporations" and citing six similar constitutional provisions which have been applied to corporations), *cert. denied*, 525 U.S. 1113 (1999); *BellSouth Corp. v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998) ("We assume, as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals"), *cert. denied*, 526 U.S. 1086 (1999).

[9] The strength of the consensus that exists on this issue is indicated by the fact that the petitioners' argument that the Bill of Attainder Clause does not apply to corporations represents an afterthought on their part. None of the petitioners made this argument in the district court (*see* Pataki Pet. 43a n.4), and petitioner Brodsky was the only petitioner who advanced the argument in the court of appeals (*see* Pataki Pet. 8-9 n.4).

such a "purely personal guarantee."

"To prohibit legislative Acts 'contrary to the first principles of the social compact and to every principle of sound legislation,' the Framers included provisions they considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'" *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (quoting The Federalist No. 44, at 282 (C. Rossiter ed. 1961) (J. Madison) and *id.* No. 84, at 511 (A. Hamilton)). These provisions, all embodied in Article I, § 10 of the Constitution, are the Bill of Attainder Clause, the *Ex Post Facto* Clause, and the Contract Clause. *Carmell v. Texas*, *supra*, 529 U.S. at 521; *see also, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810). The Bill of Attainder Clause, like "its textual and conceptual neighbor" the *Ex Post Facto* Clause, "aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." *Carmell v. Texas*, *supra*, 529 U.S. at 566 (Ginsburg, *J.*, dissenting); *see also, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-25 (1866).

Thus the Bill of Attainder Clause, like the *Ex Post Facto* Clause and the Contract Clause, is a limitation on legislative power, not a purely personal right. For this reason, this Court has repeatedly entertained claims by corporations under the *Ex Post Facto* Clause[10] and under the Contract Clause.[11] By the same token, corporations are entitled to invoke the protections of the Bill of Attainder Clause.

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[10] *See, e.g., Chicago & Alton R.R. v. Tranbarger*, 238 U.S. 67, 73-74 (1915); *Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 152-53 (1911); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107-08 (1909).

[11] *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186-91 (1992); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-19 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250-51 (1978).

That the Bill of Attainder Clause is not merely a personal right is also clear from the text of the Constitution itself. The Constitution does not say merely that individuals have a right not to be victimized by bills of attainder. Instead, it says, categorically and without exception, that "[n]o State shall . . . pass *any* Bill of Attainder . . . ." U.S. Const., Art. I, § 10 (emphasis supplied). It follows that any victim of a bill of attainder – whether a natural or a juridical person – may invoke the constitutional prohibition.

The teaching of history is to the same effect. Historically, bills of attainder have been directed not only against individuals, but also against groups and against corporate entities such as boroughs.[12] And this Court has struck down bills of attainder directed against groups, as well as against named individuals. *See, e.g., United States v. Brown*, 381 U.S. 437, 461 (1965) (striking down bill of attainder directed against the Communist Party); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-35 (1866) (striking down bill of attainder directed against ex-Confederates).[13] There is no reason why the constitutional protection against being singled out for punishment without the safeguards of a judicial trial should not apply to all.

For all these reasons, there is no need for this Court to take up the issue of the applicability of the Bill of Attainder Clause

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[12] *See, e.g., Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866); *see also, e.g.*, 1 & 2 Geo. 4, c. 47 (1821) (stripping a borough of its seats in Parliament on a finding of bribery and corruption); 22 Geo. 3, c. 31, § 1 (1781) (changing the qualifications for voting in a borough on a finding of bribery and corruption); 11 Geo. 3, c. 55, § 2 (1771) (same).

[13] Petitioners argue that the Bill of Attainder Clause was intended to protect "disfavored" persons (Pataki Pet. 16; Brodsky Pet. 21-23). As the district court observed (with considerable understatement), Con Edison, "although not the prototypical powerless victim of constitutional overreaching by any stretch of the imagination, is clearly politically unpopular" (Pataki Pet. 49a).

to corporations – an issue on which there is no conflict among courts, and on which not a single judge of any court has espoused petitioners' position.

B. The Court of Appeals Correctly Applied the Standards Articulated by This Court Under the Bill of Attainder Clause, and Petitioners' Argument to the Contrary Disregards the Facts Found Below

Petitioners argue that review by this Court is necessary because the court of appeals supposedly departed from the standards articulated by this Court under the Bill of Attainder Clause, and allegedly created a new test focusing on "less burdensome alternatives" (Pataki Pet. 17-25; Brodsky Pet. 8-15).

Nothing could be further from the truth. Petitioners' argument is based on a palpable misreading of the decision of the court of appeals. Far from creating a new legal standard, the court of appeals correctly applied the Bill of Attainder Clause standards set forth by this Court in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), to the facts it found based on the uncontradicted record in this case.

The three essential elements of a bill of attainder, as defined by this Court, are "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 847.

Petitioners do not dispute (*see* Pataki Pet. 7; Brodsky Pet. 6) that the first and third elements of a bill of attainder – "specification of the affected persons" and "lack of a judicial trial" – are present in this case, as both courts below found (Pataki Pet.

10a, 16a-17a, 46a). The sole element disputed by petitioners is whether the Indian Point Law imposed "punishment," as both courts below also found (Pataki Pet. 17a-28a, 47a-54a).

This Court has formulated a tripartite inquiry for use in assessing whether a statute imposes punishment within the meaning of the Bill of Attainder Clause:

> "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service System v. Minnesota Public Interest Research Group, supra*, 468 U.S. at 852 (quoting *Nixon v. Administrator of General Services, supra*, 433 U.S. at 473, 475-76, 478).

These factors are to be weighed together in determining whether a statute imposes punishment, and it is not essential that all three factors be satisfied. *See Nixon v. Administrator of General Services, supra*, 433 U.S. at 475-76.

The court of appeals carefully weighed each of the three factors identified by this Court (Pataki Pet. 19a-28a). Petitioners assert that the court found that the first and third factors were not satisfied (Pataki Pet. 18; Brodsky Pet. 7, 12), but this is not so. Rather, the court held that it did not need to decide whether the historical test was met because the functional test was clearly satisfied (Pataki Pet. 20a). And, while the court stated that it did not rely on the evidence of legislative intent alone, it found that some legislators (including the Senate sponsor of the law) "unquestionably intended to punish Con Ed," and that this reinforced its independent conclusion based on the functional test (Pataki Pet. 28a).

Addressing the functional test, the court of appeals stressed – as had the district court (Pataki Pet. 53a) – that the record showed that a "quite substantial proportion" of the costs that the Legislature disallowed by the Indian Point Law would have been incurred even if the steam generators had been replaced earlier, and that their disallowance therefore could not be said to serve a compensatory function (Pataki Pet. 24a-27a).[14] Petitioners argue that the court of appeals thereby required "a *precise* fit" between the statute and its supposedly compensatory goals (Pataki Pet. 20; emphasis in original).

This argument is flatly contrary to the record facts. The record established that 60% of the total period of the outage – that is, $150 million of the total deprivation of $250 million mandated by the law – was accounted for by a pre-planned refueling and maintenance outage and by the installation of the new steam generators, both of which would have taken place even if the steam generators had been installed earlier (A1360, A1375). *The petitioners did not contest this crucial fact*; indeed, they waived an evidentiary hearing in the district court (Pataki Pet. 6). Thus, far from requiring a "*precise* fit" between the law and the quantum of compensatory damages, the court below simply made the obvious finding, based on the uncontradicted record, that a deprivation that exceeded compensatory damages by roughly $150 million imposed punishment (Pataki Pet. 25a-26a).

In so finding, the court of appeals followed the teaching of this Court in *Nixon v. Administrator of General Services, supra*, 433 U.S. at 482, that "[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives."

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[14] These are precisely the costs that would not have been disallowed by the PSC even if it had made a finding of imprudence (*see* p. 4 *supra*), but whose disallowance was mandated by the Legislature (*see* pp. 11-12 *supra*).

While the petitioners try to argue that this statement applied only to the purpose test (Pataki Pet. 22-23; Brodsky Pet. 13), this Court made clear in *Nixon* that the same principle applies to the functional test. *See Nixon, supra*, 433 U.S. at 475-76 (in applying the functional test, the law under challenge must be "viewed in terms of the type *and severity* of burdens imposed" (emphasis supplied)). Thus the court of appeals did not create a new "less burdensome alternatives" test, but simply applied the teaching of this Court that a law that imposes a deprivation of property going far beyond compensation must be viewed as imposing punishment.

Thus petitioners' argument that the court of appeals applied a new "less burdensome alternatives" test is founded on a misreading of the decision below and of this Court's decision in *Nixon*, and is contrary to the uncontradicted facts established by the record in this case.[15]

C. The Decision Below Will Not Result in the Ruinous Consequences Predicted by Petitioners, Because the Indian Point Law Is – for Good Reason – Literally Unique in the Annals of American Jurisprudence

Petitioners vie with each other to predict disastrous consequences if the decision below is not reversed, saying, for example, that it will "expose numerous laws regulating businesses to constitutional challenge" (Pataki Pet. 12), and that it will "endanger economic regulatory decisions made by legisla-

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[15] Petitioners try to manufacture a conflict between the holding of the court below and the statement of the District of Columbia Circuit in *BellSouth Corp. v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998), that "it does not matter that Congress arguably could have enacted different legislation" (Pataki Pet. 24; Brodsky Pet. 9, 10), but there is no such conflict, because the *BellSouth* court was not confronted with a statute that imposed a deprivation of property that was concededly far in excess of compensatory damages.

tive bodies across the nation" (Brodsky Pet. 14). There is no basis for these hyperbolic claims.

The fact is that the Indian Point Law is literally unique in the annals of American jurisprudence. Petitioners have cited – and we have found – no other case since the ratification of the Constitution in which a legislative body has (1) tried and determined the issue whether a specific person was at fault in connection with a specific past occurrence, (2) imposed a deprivation far exceeding the amount of compensation, and, to make matters worse, (3) retrospectively applied different substantive standards than those applicable to all other persons and occurrences.[16] Only a law that does all of these things – or at least the first two of them – has anything to fear from the decision below. The court of appeals rightly stressed "the extraordinary scarcity of legislation of [this] type" which is not only "so exceptionally narrow in scope," but also "manifestly retrospective in focus, and unavoidably punitive in operation" (Pataki Pet. 29a).

In particular, contrary to petitioners' argument (Pataki Pet. 25-26; Brodsky Pet. 16-18), the decision below does not threaten the legislative power to set utility rates which this Court reaffirmed in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). As the court of appeals correctly emphasized (Pataki Pet. 17a), the Indian Point Law was not a prospective measure setting utility rates for the future, but rather was a retrospective adjudication of Con Edison's supposed imprudence in the context of the electric rates which had already been set by the PSC for Con Edison back in 1997 (*see* pp. 2-3, 4-5

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[16] Before the adoption of the Constitution, as this Court explained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-22 (1995), such instances of legislative overreaching were not uncommon, but it was one of the fundamental goals of the Framers of the Constitution to end such abuses. *See id.* at 222-25; *see also, e.g., Carmell v. Texas*, 529 U.S. 513, 521 (2000).

supra).[17] When these facts are combined with the punitive nature of the deprivation imposed by the law, it becomes obvious that the decision below poses no threat to any legislature that wishes to return to the 19th-century practice of setting utility rates itself. The decision below simply reminds us that, whatever power it purports to exercise, the Bill of Attainder Clause requires a legislature to avoid punitive deprivations based on retrospective adjudications of guilt in individual cases.

II. The Issues Raised by Petitioners Are Not Determinative of This Case, Because the Indian Point Law Is Invalid for Additional Reasons Which Were Not Reached by the Court Below

In addition to the Bill of Attainder Clause, which was the ground on which both courts below invalidated the Indian Point Law, Con Edison also contended below that the law is invalid as (a) a denial of equal protection, (b) a denial of procedural due process, (c) an attempt to regulate nuclear health and safety that is preempted by the Atomic Energy Act, and (d) a violation of the Contract Clause (A22-A27). Although the court of appeals found it unnecessary to reach these additional grounds, their presence makes it even more clear that the issues sought to be raised by petitioners are not determinative of the result in this case.[18]

A. Equal Protection

In addition to finding that the Indian Point Law violated the

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[17] It was conceded below that the Legislature's action here was an adjudication (A1379).

[18] It is well established that a respondent in this Court may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Bill of Attainder Clause, the district court also found that it violated the Equal Protection Clause (Pataki Pet. 35a-42a). The Court of Appeals did not reach this question, although it expressed doubt that the law denied equal protection (Pataki Pet. 8a-9a n.2).

The Indian Point Law singles out a single utility – Con Edison – and a single past incident – the February 2000 outage at Indian Point. This alone does not necessarily mean that the law denies equal protection, because "[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). However, a law that defines a "class of one" is not automatically valid either. The question here, as in most equal protection cases, is whether there is a rational basis for having one set of substantive and procedural rules applicable only to Con Edison, and a different set applicable to all other utilities in the state. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

The law created two classes of utilities. One class (all other utilities) has substantive and procedural rights with respect to the issue of imprudence (*see* pp. 12-13 *supra*). The other class (Con Edison) has none of these rights (*see id.*).[19] The petitioners argued below that the use of different rules for Con Edison was rational because it was the only utility in the state that still used Westinghouse Model 44 steam generators (Pataki Pet. 39a-40a). But, as the district court pointed out (*id.*), there is no reason why the legal standards governing imprudence should be changed for a single outage merely because the outage involved one type of equipment rather than another.

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[19] The critical importance of these differences is demonstrated by the fact that the very factors which the PSC had held were insufficient to give rise to a substantial likelihood of imprudence formed the basis for the Legislature's finding of imprudence (*see* pp. 8, 9 *supra*).

This case exemplifies the wisdom of Justice Jackson's now-classic observation in his concurring opinion in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949), that "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *See also, e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86-87 (1916) (Holmes, *J.*) (if the legislature were to declare a single company presumptively guilty of monopolization, "we suppose that no one would contend that the [company] was given the equal protection of the laws").

B. Procedural Due Process

Procedural due process analysis proceeds in two steps: "we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001) (citation omitted).

As the court of appeals found (Pataki Pet. 20a), the Indian Point Law clearly deprived Con Edison of a property interest, because the FAC in Con Edison's tariff approved by the PSC in 1997 entitled Con Edison to recover a specified portion of the increased energy costs caused by an outage, unless the PSC made a finding of imprudence after a hearing (*see* pp. 2-5 *supra*). "A state-created entitlement that cannot properly be eliminated except for cause is a property right of which the holder may not be deprived without procedural due process." *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987) (citing, *inter alia*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985)). Indeed, a utility's due process right to a hearing on the issue of imprudence has been expressly recognized by the New York State Attorney General (*see* pp. 3-4 *supra*).

In *United States v. Florida East Coast Ry.*, 410 U.S. 224, 245

(1973), this Court, after reviewing its prior decisions, formulated the following general standard differentiating the policy-type proceedings in which no hearing is required by due process from the quasi-adjudicatory proceedings in which a hearing is required:

> "[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."

The issue of imprudence raised in this case is quintessentially a quasi-adjudicatory issue on which a hearing is required, because it is a "proceeding[] designed to adjudicate disputed facts in [a] particular case[]." As the PSC admitted below, "[t]his was an adjudicatory act" (A1379). New York law explicitly recognizes the utility's right to an evidentiary hearing on this issue (*see* pp. 3-4 *supra*).

The procedures followed by the State Legislature in enacting the Indian Point Law clearly did not comport with due process, as both courts below found (Pataki Pet. 10a, 46a). The law thus violated Con Edison's due process rights.

C. Atomic Energy Act Preemption

As the court of appeals noted (Pataki Pet. 23a-24a), "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Therefore, state regulation of nuclear power plant safety is preempted if *either* the purpose *or* the effect of the state regulation is to regulate nuclear power plant safety. *See, e.g., English v. General Elec. Co.*, 496 U.S. 72, 84 (1990). The

Indian Point Law is preempted under both of these tests.

First, the Indian Point Law proclaimed on its face its purpose to regulate nuclear power plant safety, saying, for example, that "[r]ate regulation of nuclear operators should discourage the taking of risks with regard to *potential threats to public health and safety*" (Pataki Pet. 2; emphasis supplied). Both the Assembly and the Senate debates contained repeated accusations that Con Edison had endangered the public health and safety, despite the undisputed fact that the February 2000 leak did not result in any such danger (*see* pp. 6-7 *supra*). *See, e.g.*, A89 ("ConEdison has not kept the safety of the people in the surrounding areas and beyond upper most in their mind"); A109 ("they should certainly be penalized for taking our health and toying with it"). Thus the Indian Point Law clearly had the forbidden purpose to regulate nuclear power plant safety.[20]

Second, any state statute that "seek[s] to regulate the construction or operation of a nuclear powerplant" is preempted because, "even if enacted out of non-safety concerns, [it] would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, supra*, 461 U.S. at 212. In the present case, the Indian Point Law effectively mandated the replacement of the existing steam generators, whether or not their use was consistent with the NRC's regulations and directives, by the simple but effective device of disallowing all replacement power costs "until the conclusion of such outage, *or incurred at any time until all defective steam generation equipment at the facility has*

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[20] The petitioners argued below that the law would be valid if it had an economic purpose as well as a safety purpose, but comparable questions have been addressed by this Court under other federal statutory schemes, and have been answered in the negative. *See, e.g., Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 104-08 (1992); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

been replaced, whichever occurs later" (Pataki Pet. 2; emphasis supplied). Thus the Indian Point Law is preempted for this reason as well.

D. Contract Clause

The Contract Clause of the Constitution – which, like the Bill of Attainder Clause, is found in Article I, § 10 (*see* p. 15 *supra*) – provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

Whether a state law violates the Contract Clause is determined by a three-step analysis, which asks in turn: (1) whether the law is a substantial impairment of a contract; (2) whether it serves a significant and legitimate public purpose, such as remedying a general social or economic problem; and, if such a public purpose is established, (3) whether the means chosen to accomplish the purpose are reasonable and appropriate. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-44 (1978).

The substantial impairment inquiry has three subparts: (1) whether there is a contract; (2) whether the law impairs the contract; and (3) whether the impairment is substantial. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The agreement approved by the PSC in 1997, which fixed the rates for Con Edison during the relevant period after reflecting rate reductions of more than $1.1 billion (*see* pp. 4-5 *supra*), plainly fits within the definition of a contract as "a bargained-for exchange between the parties," *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 67, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978), because it was the product of lengthy negotiations in which Con Edison made very significant concessions in return for, among other things, an FAC to protect against the vicissitudes of the newly volatile energy

market (*see* pp. 4-5 *supra*).[21] Clearly, the Indian Point Law substantially impaired Con Edison's rights under the agreement, because it swept away $250 million in replacement power costs to which Con Edison was entitled under the agreement.

If a substantial impairment of contract is to be upheld despite the Contract Clause, there must be "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411-12 (citation omitted). In applying this requirement, this Court has distinguished between generally applicable legislation and legislation singling out a narrow category of persons for distinct treatment. *See, e.g., Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at 248-49. The Indian Point Law bears no resemblance to the statutes that have been held to serve a broad societal interest. On the contrary, it is narrowly focused upon a single occurrence and a single utility. As the PSC told the Legislature, it "prohibits Con Edison, *but no other utility*, from recovering power replacement costs – *even if they are found prudent*" (A82; emphasis supplied). Therefore, the law does not serve a substantial public purpose within the meaning of the Contract Clause.

Even if legislation has a significant public purpose – which was not the case here – courts must still determine whether the means chosen to achieve the goal were reasonable in light of, among other things, less drastic alternatives. *See, e.g., United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977). Here, the Legislature clearly had a less drastic alterna-

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[21] A long line of federal cases has held that settlement agreements between utilities and their regulatory commissions are binding contracts. *See, e.g., Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 347 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963). The PSC argued below that this is not true of settlement agreements approved by it, but no New York case so holds.

tive: to rely upon the PSC to perform its historic role of adjudicating a claim of imprudence. Since a generally applicable means for protecting the public interest without impairing contract rights was available, the Indian Point Law was unnecessary to advance a legitimate public purpose, and therefore violated the Contract Clause.

CONCLUSION

For the reasons set forth above, the petitions for a writ of certiorari should be denied.

Dated: New York, New York
October 22, 2002

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No. 02-358

Supreme Court U.S.
FILED
NOV 4 2002
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IN THE

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Petitioners,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY BRIEF

1. Consolidated Edison Company of New York, Inc. (Con Edison) incorrectly contends that the applicability of Bill of Attainder Clause protections to corporations is settled because courts have assumed the Clause applies to corporations. Inasmuch as no previous court has found a corporation to satisfy the Bill of Attainder Clause's three-pronged test for invalidating legislation, *Consolidated Edison Company of New York, Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002), there has been little reason to litigate the potentially troublesome question of whether corporations warrant bill of attainder protection. The Second Circuit's decision, however, brings the unsettled question to the forefront not only because it applies bill of attainder protection to corporations, but, as indicated in our petition, it uses an

unprecedented, highly exacting functional test for determining whether legislation "punishes" a corporation.

Further, Con Edison asserts that the uniqueness of Chapter 190 is a reason to deny the petition. By their very nature, and inherently, statutes raising bill of attainder concerns are unique in their facts and in their legislative response, more so than any other matter of constitutional controversy. What is not unique is the application of principles of law to such situations. The decision of the Second Circuit to explicitly apply bill of attainder protections to corporations differs with the decisions of other Circuits as to the nature of that application and the creation of a new set of tests and standards.

2. Although this Court has held that legislation that reasonably furthers non-punitive purposes is not punishment under the functional test, the Second Circuit found that Chapter 190 constituted punishment because Con Edison was denied recovery of all power replacement costs associated with the Indian Point 2 outage, including those associated with maintenance, refueling and replacement of the generators (292 F.3d at 351-353). Con Edison argues that the Second Circuit's application of the functional test was not premised on requiring a close fit between Chapter 190's purpose (maintaining just and reasonable rates) and its remedy. According to the utility, the *uncontroverted record evidence* (a reply affidavit of a utility attorney (A-1360) and oral argument by another company attorney before the District Court (A-1375)) established that 60% of the cost recovery denied Con Edison had nothing to do with the Indian Point 2 plant outage (Con Edison, p. 19).

Con Edison's claim of uncontroverted record evidence is wrong. An attorney's affidavit on a highly technical issue and unsubstantiated claims at oral argument are not evidence and all defendants at the District Court denied the utility's assertion in their answers (A-205; A-677; A-1088). In any event, Con Edison's mischaracterization of the record does not answer

our point that the Second Circuit's close fit functional test is unprecedented.

3. The Second Circuit suggested that Con Edison's equal protection argument was baseless and it did not address the utility's claims regarding procedural due process, Atomic Energy Act preemption and the Contracts Clause. In an apparent attempt to dissuade the Court from examining whether Chapter 190 is a bill of attainder, the utility nonetheless asserts each theory in its response. The utility's contentions are both incorrect and irrelevant to whether the Second Circuit's decision warrants review.

With regard to equal protection, inasmuch as Chapter 190 admittedly advances the crucial public purpose of safeguarding the consumer's right to just and reasonable rates and Con Edison was the only nuclear operator in New York still using the known-defective Model 44 generators, Con Edison represents a legitimate class of one. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

This Court has long recognized that statutory enactments are not subject to attack under the Due Process Clause for lack of notice and an opportunity to be heard prior to the statute's enactment. *See, e.g., Chesebro v. Los Angeles Cty. Flood Control Dist.*, 306 U.S. 459, 464 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 304-305 (1933); *Spencer v. Merchant*, 125 U.S. 345, 353 (1888). Con Edison's citation to case law involving administrative proceedings is therefore inapposite and, under the proper standard, its due process claim fails.

As this Court indicated in *Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 198 (1983), the Atomic Energy Act was not intended to diminish the states' authority to assure "just and reasonable"

retail electric rates. Because Chapter 190's primary purpose was to maintain "just and reasonable" rates, Con Edison's preemption theory is without merit. *See* 461 U.S. at 211-212.

Finally, Con Edison's claim that the Commission's 1997 rate opinion represented an "agreement" between the utility and the Commission (Con Edison, pp. 4, 27-28) is incorrect. The Commission was not a party to negotiations with Con Edison in its 1997, or any other, rate proceeding. *Matter of MCI Telecommunication Corp. v. Public Serv. Comm'n*, 231 A.D.2d 284, 291, 659 N.Y.S.2d 563, 569 (3d Dep't 1997) (wherein the court noted that the Commission is the decisionmaker in its proceedings, not a party to negotiations between utilities, Department staff and other parties). Under settled New York law, the Commission's rate order did not represent a contract with Con Edison. *Matter of United Water New York, Inc. v. Public Serv. Comm'n*, 252 A.D.2d 810, 811, 676 N.Y.S.2d 709, 711 (3d Dep't 1998); *Matter of Kessel v. Public Serv. Comm'n*, 193 A.D.2d 339, 344, 603 N.Y.S.2d 905, 908 (3d Dep't 1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

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